Law Enforcement Newsletter

FROM THE OFFICE OF THE
Attorney General
For The Commonwealth of Massachusetts

Scott Harshbarger
Attorney General

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Vol. III, No. 1 November 1993

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Letter from the Attorney General:

White-Collar Crime and the Importance of Detection, Prosecution and Sentencing

November, 1993

To Members of the Law Enforcement and Criminal Justice Community:

The issues of urban violence, drug dealing and crimes within the home have dominated our debate on public safety just as they have demanded the greatest share of our police, prosecutor and judicial resources. With our prisons overcrowded, meaningful sentencing reform still just a topic for legislative debate, and unemployment spawning a new generation of disaffected youth, the public's confidence in our great institutions--government, judiciary, and business--has reached new lows. Restoration of public confidence is a necessary foundation for any civic and economic recovery.

While it may be easy to say that we must regain public respect and confidence, this cannot happen until we have our own house in order. As Attorney General, I have assigned full-time assistant attorneys general to work with assistant district attorneys prosecuting cases in such urban areas as Boston, Lawrence, Lowell, and Brockton. But drug dealers, wife batterers and child abusers are not the only criminals who require our attention. Indeed, one could argue that a greater threat to our society is posed by non-violent offenders--lawyers who steal from their clients, government officials who violate their public trust, financial advisors who prey upon the elderly, doctors who abuse our Medicare system, corporate officers who supplement high salaries with embezzled funds--whose crimes provoke public scorn and ridicule for an establishment that cannot police its own.

Despite very limited prosecutorial tools and archaic laws and penalties (at least as in comparison to the federal system), my office has given these crimes priority not only to demonstrate the need to focus on white-collar offenses, but also to signal our resolve to enforce the law fairly and

equally across our social landscape. By working closely with state and local agencies and businesses, we have investigated and prosecuted a range of cases involving fraud in both the public and private sectors. Recently I released the second of my series of reports on fraud, entitled "The Modern Face of Public Corruption and White Collar Crime." This second report focuses on the extent, and cost to our society, of state and local public corruption and white collar and economic crimes in the private sector. (The first report focused on Medicaid fraud, unemployment compensation fraud and automobile and workers compensation insurance fraud.) The reports deal in cold, hard facts: real people convicted of real crimes which cost our society real dollars; what I have called the "FRAUD TAX." The "FRAUD TAX" is the hidden, extra amount that we pay in taxes, in insurance premiums and for goods and services, all of which is added to cover the cost of fraud and corruption.

But the cost of fraud and corruption in the public and private sectors must not be measured solely in terms of dollars and cents. The impact of fraud and corruption must also be recognized in a more immeasurable way: the loss of trust and public confidence in our societal institutions, both public and private. This sense of distrust breeds cynicism, the attitude that "everyone does it" and that it is our right to try to "beat the system." More importantly, when the sentences for these white collar offenders do not reflect the seriousness or extent of their crimes, or fall below the punishment meted out to criminals who are not lawyers, politicians, doctors or corporate executives, we violate our morale imperative to provide "equal justice" under the law.

As professionals in the criminal justice system, we easily recognize the harm and tragedy of violent crime: a woman is beaten and stabbed by her husband, boyfriend or ex-lover; an innocent child is raped and sodomized; a young man is killed in a fight over a gold chain. But we must also recognize the harm of non-violent crime even where the victims are faceless (which is not always the case) and where the effects are more diffuse.

For example, the Board of Bar Overseers has referred to my office for prosecution 5 lawyers on charges of embezzlement from elderly clients. In most of these cases, the embezzled funds represented all or a significant portion of a retiree's life's savings. Another 6 lawyers were charged with stealing client funds in connection with personal injury settlements, real estate ventures, and investment trusts. There is growing sentiment in society that lawyers are not serving the interests of their clients, yet life has become too complex for most

people to manage their business and financial affairs alone. When a lawyer steals from an elderly client, harm befalls not only the victim and the victim's family, but other elderly citizens whose confidence in the legal profession is shaken.

In conjunction with the Department of Revenue, my office investigates and prosecutes charges of tax evasion and non-filing. Here, no single victim calls attention to the offense. Yet after several years of debilitating budget cuts which have affected every public service and program, including our justice system, we must acknowledge that a voluntary program of tax compliance cannot suffer any willful refusal to participate. A successful lawyer who is also a member of his city's school committee cannot be allowed to go ten years without filing or paying his state income taxes while working class families pay their taxes year in and year out. A restaurant owner cannot be allowed to collect without paying over to the Commonwealth more than $375,000 in meals taxes while other, tax-paying businesspersons struggle to survive in a recession-stifled economy. Failure to prosecute and punish offenders such as these costs us not only the specific taxes, interest and penalties owed by the defendant, but the taxes not paid by others either who perceive no meaningful deterrent to tax evasion, or who rebel against the unequal enforcement of laws that ostensibly are written for everybody.

In 1992 my office prosecuted the treasurer of a regional school district for embezzling more than $1,000,000. Again, no one person alone endured a tragedy; yet that school district's handicapped ramp was not built, teachers were laid off and school programs were curtailed.

The costs to society from these crimes is mounting, but many of us fail to recognize the consequences. Indeed, our justice system has become part of the problem. Significant white collar crimes are complex by definition. These offenses are committed by intelligent, educated persons--many of them professionals--who use their expertise and position of trust to steal in such a way that detection is difficult. Uncovering these crimes demands a dedication of prosecutorial time and resources uncommon in areas of violent crime. Yet, once caught, defendants rely upon that very same complexity of scheme to secure more favorable treatment from judges belabored by an overburdened caseload. It is not uncommon for prosecutors to be told by a judge that he or she "cannot tie up this session" with a complex, "paper" case. The result often is a guilty plea on terms dictated by the defendant. In this way, a white collar defendant is actually rewarded for his

detailed planning and execution of criminal conduct. And the criminal justice system continues to swirl in a vicious circle: limited court resources result in "bargain" dispositions which do not deter future offenses, which result in further limited court resources.

Moreover, unlike crimes such as rape and robbery about which there is judicial consensus as to the serious nature of the offense, there is no common judicial valuation affixed to white-collar crimes. For example, a blue-collar employee of a Connecticut manufacturing plant who fails to file a Massachusetts resident income tax return for four years is sentenced to a period of incarceration in the house of correction, while a successful attorney who has not filed or paid income taxes for five years is given a suspended sentence and a fine. The controller of an automobile dealership who embezzled $1.2 million from his employer is sentenced after a guilty plea to serve 18 to 20 years in state prison, while a Revere man who embezzles more than $1.5 million from an elderly widow is sentenced after trial to serve 4 to 5 years in state prison. This disparity among sentencing practices further squanders precious judicial resources and credibility by promoting needless continuances as defendants shop among judges.

It is time to re-examine our sentencing principles and to apply them in a way that makes sense. No rational person believes that all crimes can be detected and prosecuted. There simply is not enough money in any state budget to hire personnel to audit every tax return or client escrow account, to verify every bill charged to Medicaid, or to trace the proceeds of every government contract. Our society functions on the premise that most persons will adhere to the laws enacted by its government. But to enhance voluntary compliance with the law, there must be a deterrent to misconduct. That deterrent is the risk of prosecution and incarceration.

White collar crimes--corruption, embezzlement, tax evasion, Medicaid fraud--are perhaps the only offenses truly susceptible to general deterrence. In the first place, the rational nature of the crime - with all its subtle economic calculations - requires deliberation and some form of cost-benefit analysis. The planning and execution allow for pause and reflection. The perpetrators of these crimes are not disenfranchised illiterates. When a lawyer is convicted and incarcerated for stealing from his clients, there is every likelihood that other lawyers who may be contemplating similar crimes will know that a prison sentence is probable and, therefore, will re-evaluate the potential costs of their conduct.

Secondly, the sting of incarceration is felt more sharply by white-collar criminals. Ill-suited for the life behind bars, they do not proclaim proudly, "I can do the time standing on my head," as is frequently the case with recidivist violent offenders. It is precisely because incarceration is a painful and embarrassing penalty for white collar criminals that it is also an effective deterrent.

That our society needs a strong deterrent to crimes of this nature cannot be gainsaid. Unlike a convenience store hold-up, the crimes committed by lawyers, doctors, business executives and government officials are difficult to detect and prove. While the profits can be astronomical, the risks are minimal. And where there is no risk, there is no reason to be deterred. This insidious quality of white collar crimes requires a strong, certain external deterrent. The only such deterrent available is the certainty that, if caught, the perpetrator will be incarcerated.

It is axiomatic that "the punishment should fit the crime." All too often, however, we use a different tape measure to sentence white collar criminals. A burglar arrested for ten B&Es is said to be a "one man crime wave" and punished severely. Yet the same is rarely said about a doctor who on twenty separate occasions submits a phony bill to Medicaid, or about a bank official who on almost fifty occasions electronically transfers funds from the accounts of elderly customers into his own account. These are not spontaneous products of severe economic stress, hunger, addiction to narcotics or mental instability. These decisions to steal again and again are informed, deliberate and repetitive. They merit punishment.

To put it bluntly, a defendant who chooses a weapon as the instrument for his theft is treated more harshly (exponentially so) than one who steals a much greater sum through fraud or deceit accomplished with a pen or computer. All too often, this disparity widens the gap between classes and races, not because one crime is worse than the other, but because social position and status dictate the instrument available to one contemplating the crime.

Our criminal courts dispense public justice -- crimes are charged as wrongs against the Commonwealth. It is through our criminal justice system that we reinforce commonly-shared beliefs and principles: e.g., stealing is wrong; all persons are treated equally under the law. The sentencing process is an important component of this effort. Although individual

crimes should be judged individually, this must happen within a framework of principles which apply to all defendants and which serve the interests of all society. Even today, some judges say to prosecutors: "Which do you want, restitution or incarceration? You can't have both." Why not? What principle of justice requires prosecutors to choose between recompense to innocent victims and punishment for willful criminal acts?

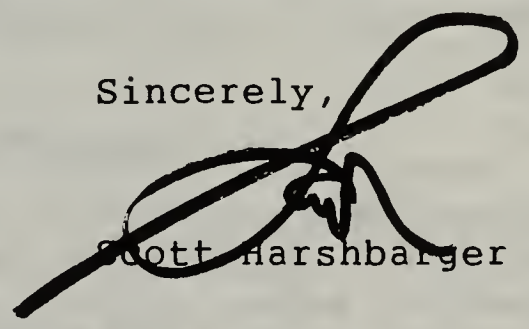
With a crowded court docket and many other defendants held on bail awaiting trial, it will always be easier to offer a white collar offender the opportunity to plead guilty in return for a suspended sentence and an order of restitution. When that occurs, however, the message is unmistakable: crimes committed by middle- and upper-class defendants are just not taken seriously. A convicted lawyer, doctor or corporate executive, who is allowed to walk free from the courthouse, subject only to probation supervision and an order to make restitution, has been told that his criminal intent is somehow different from the criminal intent of the convicted burglar. An order of restitution does not make the victim whole because the payments, if they ever are made, occur over time. Such a defendant, as well as others contemplating similar conduct, effectively are told that stealing will be treated as a zero-interest loan. Far from serving as a deterrent to crime, these sentences suggest that crime does pay, and often pays well.

When the Commonwealth recommends a lengthy state prison sentence for an attorney who has embezzled hundreds of thousands of dollars from his clients, or for an investment advisor who has embezzled more than $1.5 million from an elderly widow, or for a state employee who has embezzled hundreds of thousands of dollars from the Department of Public Welfare, the recommendation reflects not only that the defendant made dozens of conscious decisions to steal. After defrauding ten victims over a period of five years, for example, a defendant cannot be said to be a "first time offender." But such a recommendation also reflects the "discount" awarded to non-violent offenders who are eligible for parole in one-half the time of violent offenders. The legislature already having distinguished between robbery (2/3 parole eligibility) and embezzlement (1/3 parole eligibility), the Commonwealth's recommendation focuses on real time to serve as both punishment and as a deterrent to others.

I have said many times before that our criminal justice system is greatly in need of meaningful sentencing reform, including truth-in-sentencing provisions and guidelines for

ensuring consistency of sentences across the Commonwealth. But until that occurs, we can and must do better in the context of our present rules. Ensuring swift, fair and equal justice is the place to start.

Sincerely,



Scott Harshbarger

P.S. Copies of both reports mentioned above, as well as my recommendations for legislative action, are available upon request. Contact Erin O'Sullivan, Publications Coordinator, at (617) 727-2200.

THE STATUS OF RELEASE AGREEMENTS IN MASSACHUSETTS

by: Tania Gray, Assistant Attorney General

INTRODUCTION

The Attorney General's Office was recently asked to comment on the propriety of obtaining release agreements in which a criminal defendant waives potential civil liability claims against the police as part of the disposition of a criminal case. The issue of a release agreement generally arises in the course of plea negotiations between prosecutors and criminal defendants. These agreements involve a defendant's waiver of the right to initiate a civil lawsuit against police officers for any potential civil claims emanating from the underlying criminal matter. In exchange, the Commonwealth recommends a disposition more favorable to the accused.

Proponents of release agreements believe that they are, in appropriate cases, a legitimate exercise of prosecutorial discretion serving the public interest. Opponents view them as inherently unfair and coerced "contracts", which impinge on defendants' rights. This article addresses the enforceability, under Massachusetts and federal law, of release agreements executed in the context of a criminal case. It also examines the role of the prosecutor in executing these agreements.

MASSACHUSETTS LAW

The Massachusetts Supreme Judicial Court addressed the issue of release agreements in Foley v. Lowell Division of the District Court Department, 398 Mass. 800 (1986), holding that dismissing criminal complaints in exchange for releasing related civil claims is inappropriate. Id. at 805. The Supreme Judicial Court relied in part on a federal case, later reversed, which held that release agreements were void as against public policy, Rumery v. Newton,778 F.2d 66 (1st Cir. 1985). In Rumery, the First Circuit stated in a passage quoted with approval in Foley, "Although we recognize the latitude which prosecutors necessarily must have in determining whether to prosecute criminal charges, a criminal defendant's decision to assert a civil rights claim is not a factor which the prosecutor should consider." Id. at 70.

In the Foley decision, the Supreme Judicial Court also cited a 1985 U.S. District Court case, Hall v. Ochs, which

articulated a similar public policy concern. In Hall v. Ochs, the court stated, "It seems to us beyond question that a criminal defendant forced to choose between being prosecuted on criminal charges on the one hand and not being prosecuted but giving up certain constitutional rights on the other, cannot as a matter of law make an uncoerced choice", 623 F. Supp. 367, 370 (D. Mass. 1985), citing Horne v. Pane, 514 F. Supp. 551, 551 (S.D.N.Y. 1981). Thus, it appears that current Massachusetts law at a minimum disfavors release agreements, and most likely would hold them entirely void and unenforceable.

FEDERAL LAW

After Foley was decided, the Court of Appeals decision in Rumery, on which the Supreme Judicial Court relied in part, was reversed by the United States Supreme Court, Town of Newton v. Rumery, 480 U.S. 386 (1987). While acknowledging the fact that the possibility of harm and abuse of prosecutorial discretion exists, the Court stated that the mere possibility of harm does not necessitate a per se rule invalidating all such agreements. Rumery, at 386-387. Furthermore, the Supreme Court concluded that entering a release agreement will, in some instances, reflect a highly rational judgment on the part of the defendant that the benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action. Id. at 387. The United States Supreme Court acknowledged the legitimacy of certain release agreements--those that were enacted voluntarily under all attendant circumstances, and those where the prosecutor's decision furthered a legitimate public interest beyond merely shielding the police from civil liability. Therefore, the United States Supreme Court established a federal standard different from the Massachusetts standard.

PRACTICAL APPLICATION

What does this mean to the prosecuting attorney or police officer in Massachusetts? Practically speaking, although the United States Supreme Court has indicated that law enforcement officials may negotiate release agreements in certain circumstances, there is nothing to indicate that the Massachusetts Supreme Judicial Court would be inclined to alter its position that such agreements are void and unenforceable under Massachusetts law. If the civil case is brought in state court rather than federal court, such an agreement is unlikely to provide a defense for the officer or officers against whom the action is brought. Therefore, prosecutors and police officers should be aware that a release agreement, which might

be validated in a federal civil lawsuit, could well be invalidated were the civil lawsuit to be filed in a Massachusetts court. Apart from the question whether police or prosecutors should engage in activity which the Massachusetts Supreme Judicial Court arguably has said violates public policy, given the holding in Foley and its underlying rationale, one should consider the wisdom of giving a benefit to a criminal defendant in exchange for a release, particularly one which could well provide no protection from civil liability in Massachusetts.

Finally, another issue raised by these agreements is the role of the prosecuting attorney in obtaining a release agreement. The argument is frequently made that release agreements serve a legitimate public interest, eliminating the diversion of law enforcement resources to the defense of civil litigation. However, because prosecutors are the attorneys for the Commonwealth rather than for the police and in light of Foley, this argument is significantly weakened. Even jurisdictions which recognize the validity of such agreements view the prosecutor's role in initiating and drafting the agreements as factors which weigh against voluntariness. Thus, prosecutors should consider whether obtaining such releases is an appropriate course to take in the disposition of a criminal case.

*Robert L. Beeman, II contributed to the writing of this article.

MOTIONS FOR EXPUNGEMENT OF CRIMINAL RECORDS

by: William J. Duensing,
Assistant Attorney General

"GET THIS ARREST OFF MY RECORD!"

Defendants charged with a crime may face consequences beyond the trial, even if they are acquitted or the charges are dismissed. They might naturally wish to have the slate wiped clean. Consequently, they sometimes bring motions in court to have the records of the case wiped clean -- "expunged." These expungement motions typically seek to have all court records and probation department records (and often, all police department records) related to the case destroyed.

Expungement motions are commonly based on the Supreme Judicial Court case Police Commissioner of Boston v. Municipal Court of the Dorchester District, 374 Mass. 640 (1987), which held that the juvenile court had the inherent power to order expungement of a juvenile's police records. Typically, the motion lists unpleasant consequences of a police record which could follow the defendant unless the court orders the records destroyed. These predicted harms usually include barriers to employment, educational or civic opportunities, embarrassment and stigma from having the defendant's photograph available for inclusion in suspect arrays and from having a police and court record accessible to members of the public, such as members of the community, potential business associates, employers and landlords. The factual presentation of the potential harms that may follow the defendant, who often has not been convicted of a crime, is likely to draw a sympathetic ear.

However, the court hearing the motion must review its authority to grant such a request. While the issue has not been explicitly decided, it appears that the courts do not have the authority to order the expungement of the records held by the Department of Probation. The legislature has provided a different remedy to protect the defendant's privacy interests and to maintain the confidentiality of criminal records. That remedy is the "sealing" statute, G. L. c. 276, §§ 100A-100C.1/

1/ G. L. c. 276, §§ 100A-100C ("the sealing statute") provide that criminal records in the Department of Probation of convictions which occurred more than ten years ago (misdemeanors) or fifteen years ago (felonies), § 100A, records of entries of a delinquency court appearance more than three years ago, § 100B, and certain cases which end without a finding of guilty, § 100C, may be sealed.

Under the provisions of the sealing statute, a defendant whose record has been sealed may answer "no record" to any inquiries regarding a criminal record which has been sealed, and the Department of Probation must report that no record exists, except to inquiries from the courts or from authorized law enforcement agencies, to which the Department reports only that a sealed record exists.2/ The legislature has provided this remedy to protect defendants who might otherwise be harmed by the existence of a criminal record.

In Police Commissioner, the Supreme Judicial Court declared that the power to order expungement remained within the jurisdiction of the court because no legislative nor regulatory mechanism had been provided to protect the vulnerable interests of the juvenile, which in that case were threatened by maintenance of records of the Boston Police Commissioner. Police Commissioner, 374 Mass. at 660-61. (The sealing statute does not apply to police department records. As the SJC stated, "[L]egislative authorization for the sealing of records has extended only to court and probation records; arrest or other police records have not been included in the specific sealing provisions." Id. at 650.) Because of the lack of any other remedy, the Court concluded that expungement was an available and appropriate remedy.

The court provided additional guidance regarding the power to expunge records in Commonwealth v. Vickey, 381 Mass. 762 (1980). The defendant in Vickey asked the court for an order to compel the Commissioner of Probation to seal his records. He had been convicted six years before of a felony for which he had later been pardoned. The SJC would not order that his motion be granted, as he did not meet the criteria set forth in the sealing statute. (His conviction was too recent. Three years after the Vickey case, the legislature amended the statute dealing with pardons, G. L. c. 127, § 152, to include a provision to seal the records of pardoned defendants. St. 1983, c. 120.)

2/ In response to a court inquiry after conviction of a subsequent criminal offense, or in response to an inquiry from the Board of Pardons, the contents of the records are made available. In response to an inquiry from a police department for the purpose of approving a firearms permit, felony or narcotics convictions are reported. In response to an inquiry from a police department for the purpose of approving a school bus driver's license, convictions of sex offenses are reported.

In response to Vickey's claim that the Superior Court might utilize its inherent powers as described in Police Commissioner, the SJC acknowledged "that the court's treatment of criminal records might be defined by statute, and that the court might act in the absence of a clear statutory definition." Vickey, 381 Mass. at 766 (emphasis added, citation omitted). The SJC noted that in Police Commissioner, where the court was found to have such power, the juvenile had no statutory right to have his police records protected. In Vickey, by contrast, where the defendant sought to have records of the Department of Probation sealed, the legislature had clearly provided a specific remedy, and so the court's jurisdiction was limited. Consequently, the court did not have the power to grant a motion ordering the expungement of criminal records held by the Department of Probation.

Although the court does not have the authority to expunge probation records, it may order other records (such as police records) expunged. However, in those instances when the court determines that it does have the power to order expungement, the court must perform a balancing test, and the police department (or other holder of the records) must be given notice of the request and must have an opportunity to be heard. See Police Commissioner, 374 Mass. at 669. The SJC remanded that case for specific written findings that the juvenile court had considered the interests of the juvenile in having the records expunged (which it suggested might require a showing of a "grave potential for injury," id. at 660) and the interests of the Commonwealth in maintaining criminal records (which it suggested might require a finding that "the utility of the records for law enforcement purposes is likely to be minimal or nonexistent," id. at 661). Therefore, at a hearing on an expungement motion, the court will ask about the value of the records and about the harm they may cause, so that it can balance these interests.

It may occur that a court will order expungement of police records even though no police representative was able to present the department's interests at a hearing. If this happens, before destroying its records, the department may seek to be heard and to have the court reconsider its decision if relevant information about the law enforcement interests could be presented.

The court listed some of the Commonwealth's likely interests: knowledge of an offender's previous antisocial behavior helps to determine appropriate dispositions and to provide information about potential threats to public welfare;

records assist in identification and apprehension of criminals; and fingerprint data provide positive means of identification. An example of the possible benefit of the police maintaining such records was shown in a recent case evaluating the behavior of police officers making an investigative stop, Commonwealth v. Willis, 415 Mass. 814 (1993). The SJC stated that an officer's knowledge that the defendant had been arrested for armed robbery, even though the charges had been dismissed (the typical "expungement-motion" scenario, in which a defendant would ask that the record of the armed robbery arrest be destroyed), provided a reasonable basis for the officers' concerns about their safety in making the stop.

In summary, the records kept by the court and the Department of Probation cannot be expunged, but the legislature has provided a means to prevent access to those records except in the very unusual circumstances of a subsequent criminal conviction, a hearing before the Board of Pardons, or, to a very limited degree, to evaluate an application for a firearms permit or a school bus driver's license. For other records (such as police records) that may not be covered by the sealing statutes, the court must hold a hearing and balance the potential for harm against the utility of the records and make written findings that expungement is needed before it can wipe the slate clean.

THE ELDERLY PROTECTION PROJECT: ITS BEGINNING, MISSION AND PROGRAMS

by: John Scheft, Director, Elderly Protection Project, Office of the Attorney General

THE BEGINNING

With funding from the United States Department of Justice, the Massachusetts Committee on Criminal Justice awarded a grant to Attorney General Harshbarger to design law enforcement training to help police departments address an emerging, fundamental concern -- protection of our elderly citizens.

The need for this training is well documented. A Police Executives Research Forum (PERF) study commissioned by the American Association of Retired Persons (AARP) indicates that law enforcement is often unclear about its role in detecting and responding to all forms of elder abuse.1/ PERF also reports that police chiefs across the nation express a strong interest in elder abuse training materials.

Many Massachusetts police executives echo this desire for more training on elder issues. They understand the critical need for increased attention to these issues in view of the dramatic increase in the elderly population which is expected well into the next century. Police executives recognize the accompanying demands for service that this population will have, and the particular care and sensitivity that patrol officers will need to exercise -- especially in the domestic violence context -- in dealing with older persons. Service to the elderly will be an important component of any community policing program.

1/ Plotkin, M. A Time for Dignity: Police and Domestic Abuse of the Elderly. Washington, D.C.: AARP, 1988. Of the 200 agencies surveyed, 175 responded. The results of the survey indicate that: (1) 82% of the respondents were unable to identify how many cases of elder abuse came to their attention in the previous year; (2) 31% were unaware of specific statutes governing the law enforcement response, when in fact they did have governing laws (this was especially important because departments with knowledge of statutes were nearly twice as likely to have special methods for dealing with domestic mistreatment of the elderly); (3) only 28% had written policies related to domestic abuse of the elderly; (4) 80% of all surveyed departments had no training on elder abuse.

To that end, Attorney General Harshbarger created the Elderly Protection Project in February of 1993. Attorney John Scheft was appointed as Project Director. Mr. Scheft has extensive experience in police training, having developed and taught several courses for the Massachusetts Criminal Justice Training Council and for Edmands & Hier Police Educational Services.

MISSION

The Elderly Protection Project trains police officers to communicate more sensitively with our elder citizens and to collaborate more effectively with protective service workers so that officers will be able to successfully intervene, report and investigate instances of elder abuse, neglect and financial exploitation.

PROGRAMS

The Project's programs are geared to three different levels of expertise:

- **Introductory Training for Recruits**

  The Project has already presented its three to four hour seminar to recruits at the State Police Academy in New Braintree; the Boston Police Academy; and several training sites of the Massachusetts Criminal Justice Training Council.

- **Basic In-Service Training for Veteran Officers**

  The Project is currently preparing to train police instructors to deliver programs of varying lengths at in-service training sites around the state.

- **Advanced Training During 16 Regional, Two-Day Seminars**

  Advanced Training is the centerpiece of the Project's initiatives.

  - <u>To Correspond to the Regions Covered by Local Protective Services Agencies</u>: Currently, there are 27 local protective service agencies (PSA) that are supervised by the Executive Office of Elder Affairs. These local agencies are responsible for investigating the elder abuse, neglect and financial exploitation reports that are generated by local police departments

and other mandated reporters. The PSA's also provide a number of services to elders in need of assistance.

It is clear that the foundation of an effective response to elder victimization begins with the cultivation and maintenance of a working relationship between local departments and protective service agencies. Promoting this police/protective service alliance is the primary goal of the Elderly Protection Project. For this reason, 16 regional trainings have been scheduled.

- Target Audience: Individual chiefs are in the best position to determine which officers they wish to receive advanced training. Some executives have sent their domestic violence detectives; others have sent crime prevention specialists; still others have seen this as an opportunity for training patrol officers who express an interest in elder issues. How each department is structured determines for whom this training is most appropriate. The Project strongly recommends that all departments send at least one officer to their regional training and we, of course, encourage departments to send more than one officer. Certificates are awarded to course participants.

- Teaching Techniques: The course utilizes a variety of learning techniques: (1) lecture; (2) brief testing to stimulate learning; (3) written materials; (4) videotapes; (5) discussion and case studies; and (6) opportunities for professional interaction.

- Topics Covered: Training sessions explore the following topics: the demographics of an increasing elder population and its implications for police services; myths and facts about aging; communicating more effectively through various techniques and by understanding the concerns, fears, and vulnerabilities of the elderly; the value of specialized training as demonstrated by the Milwaukee Study; enhanced investigation through sound report writing and photographs; financial exploitation in its various forms; the elder abuse reporting law and working with protective services; understanding domestic violence under 209A and its applicability to the elderly; Chapter 123 and mental health issues; the police response to missing persons with Alzheimer's disease; methods for the police to deal with impaired driving by elders; and case studies in elder abuse, neglect and financial exploitation.

SCHEDULE

The Elderly Protection Project will hold sixteen (16) regional, two-day, advanced law enforcement trainings. The Attorney General is pleased that Secretary Frank Ollivierre and staff from the Executive Office of Elder Affairs and its local protective services agencies will participate in and help to present the trainings.

The schedule below indicates training dates from December 1993 through May, 1994, and the participating protective service agencies and police departments from the corresponding cities and towns. Six other regional programs were held from September through November, 1993.

For further information on course locations or other details, please call or write John Scheft, Director, Elderly Protection Project, Office of the Attorney General, One Ashburton Place, Boston, Massachusetts, 02108, (617) 727-2200 ext. 2888.

December 1-2

Western Massachusetts Elder Care
Belchertown, Chicopee, Granby, Holyoke, Ludlow, South Hadley

Greater Springfield Senior Services, Inc.
Agawam, Brimfield, East Longmeadow, Hampden, Holland, Longmeadow, Monson, Palmer, Springfield, Wales, West Springfield, Wilbraham

December 8-9

Coastline Elderly Services, Inc.
Acushnet, Dartmouth, Fairhaven, Gosnold, Marion, Mattapoisett, New Bedford, Rochester

Bristol Elder Services, Inc.
Attleboro, Berkley, Dighton, Fall River, Freetown, Mansfield, North Attleborough, Norton, Raynham, Rehoboth, Seekonk, Somerset, Swansea, Taunton, Westport

January 19-20, 1994

Boston Senior Home Care
Central Boston Elder Services, Inc.
Southwest Boston Senior Services
All of the neighborhoods and areas of Boston

January 26-27

Chelsea/Revere/Winthrop Elder Services
Chelsea, Revere, Winthrop

February 9-10

Health & Social Services Consortium, Inc. (HESSCO)
Canton, Dedham, Foxborough, Medfield, Millis, Norfolk, Norwood, Plainville, Sharon, Walpole, Westwood, Wrentham

South Shore Elder Services, Inc.
Braintree, Cohasset, Hingham, Holbrook, Hull, Milton, Norwell, Quincy, Randolph, Scituate, Weymouth

February 23-24

Minuteman Home Care Corporation
Acton, Arlington, Bedford, Boxborough, Burlington, Carlisle, Concord, Harvard, Lexington, Lincoln, Littleton, Maynard, Stow, Wilmington, Winchester, Woburn

West Suburban Elder Services, Inc.
Belmont, Brookline, Needham, Newton, Waltham, Watertown, Wellesley, Weston

March 16-17

Somerville-Cambridge Elder Services, Inc.
Cambridge, Somerville

Mystic Valley Elder Services, Inc.
Everett, Malden, Medford, Melrose, North Reading, Reading, Stoneham, Wakefield

April 6-7

Highland Valley Elder Services
Amherst, Blandford, Chester, Chesterfield, Cummington, Easthampton, Goshen, Granville, Hadley, Hatfield, Huntington, Middlefield, Montgomery, Northampton, Pelham, Plainfield, Russell, Southampton, Southwick, Tolland, Westfield, Westhampton, Williamsburg, Worthington

Franklin County Home Care Corporation
Ashfield, Athol, Bernardston, Buckland, Charlemont, Colrain, Conway, Deerfield, Erving, Gill, Greenfield, Rawley, Heath, Leverett, Leyden, Monroe, Montague, New

Salem, Northfield, Orange, Petersham, Philipston, Rowe, Royalston, Shelburn, Shutesbury, Sunderland, Warwick, Wendell, Whatley

April 20-21

Old Colony Elder Services, Inc.
Abington, Avon, Bridgewater, Brockton, Carver, Duxbury, East Bridgewater, Easton, Halifax, Hanover, Hanson, Kingston, Lakeville, Marshfield, Middleborough, Pembroke, Plymouth, Plympton, Rockland, Stoughton, Wareham, West Bridgewater, Whitman

May 18-19

Elder Services Of The Merrimack Valley, Inc.
Amesbury, Andover, Billerica, Boxford, Chelmsford, Dracut, Dunstable, Georgetown, Groveland, Haverhill, Lawrence, Lowell, Merrimac, Methuen, Newbury, Newburyport, North Andover, Rowley, Salisbury, Tewksbury, Tyngsborough, Westford, West Newbury

RECENT CASES

I. SEARCH AND SEIZURE

A. Searches Pursuant To Warrant

Information from confidential informant sufficient to establish probable cause for search warrant. Commonwealth v. Soto, 35 Mass. App. Ct. 340 (1993). The search warrant affidavit stated that the affiant spoke to a confidential informant, who had previously provided the officer information about drug deals leading to the arrest of a named individual for trafficking in cocaine. At the time the affidavit was prepared, that individual was awaiting trial in Superior Court. The affidavit also stated that a man named Abreo told the informant that the defendant recently received a shipment of cocaine from New York, that the cocaine would be ready for marketing at about 6:00 p.m. that day, and that the stash was stored at his apartment, and provided the address. The informant also told the officer that a woman named "Anna" lived in the same apartment, and that Abreo was about to prepare the cocaine for sale. The officer confirmed that a woman named Anna lived at the premises described by the informant. Two detectives staked out the area just before 6:00 p.m., and saw three people separately enter the apartment, stay a short time, and leave. The affidavit also stated that the detective at the stakeout concluded, based upon his training and experience, that these actions were consistent with drug dealings.

When they executed the search warrant, police found a gun, ammunition, and 176.8 grams of cocaine. The defendant was convicted of, among other offenses, trafficking in more than 100 grams of cocaine. On appeal, he argued that the affidavit did not establish the veracity of the unnamed informant.

The Appeals Court concluded that the affidavit sufficiently established the informant's reliability. Unlike the situation in Rojas involving only prior arrests, here, the tip given by the informant led not only to an arrest but to an indictment, which assumes a judicial determination of probable cause. The Court noted this is a "significant notch higher than arrest and is sufficient to bolster the credibility aspect of the informer's tip." The Court stressed that the arrest plus probable cause is not enough alone to establish the informant's credibility, and that the weight of other factors, such as independent police corroboration, would still have to be considered. The Court noted that here, police verification went beyond innocuous facts, and included observing numerous suspicious visits to the apartment at the precise time when the informant told the officer the cocaine would be ready for

sale. The Court concluded that the informant's assertion of firsthand knowledge coupled with the specificity of facts furnished lent credence to the belief that he personally saw criminal activity and warranted a finding of credibility, and that, based upon the officers' training and experience, they reasonably inferred that drug sales were taking place in the apartment.

B. Warrantless Searches And Seizures

An officer's observation of an empty baggie coupled with his opinion that the baggie was possibly drug packaging, did not justify warrantless seizure of baggie. Commonwealth v. Garcia, 34 Mass. App. Ct. 645 (1993). A Trooper pulled over a vehicle after noting that its rear license plate was not illuminated. The driver did not have a valid license, so the Trooper asked the other three passengers whether they had valid licenses. As the passengers reached into their pockets, the Trooper illuminated the interior of the vehicle with his flashlight. He saw a transparent, glassine baggie on the floor next to the defendant. He ordered the passengers out of the car and pat-frisked each of them, then went into the car and seized the baggie. He noticed that the baggie contained a powder residue, which, based on his recent training in controlled substances, he thought was a controlled substance. The Trooper then searched the pockets of a leather jacket on the back seat floor, finding a baggie of what appeared to be marijuana. The Trooper then saw a loose seat cushion, removed it, and found a brick of cocaine. The defendant argued that all the evidence removed from the car should have been suppressed, because the Trooper did not have probable cause to conduct the search.

The Appeals Court noted that the Trooper had a valid reason (a defective plate light) for stopping the car, and that the observation of the baggie inside the car did not constitute a search triggering the Fourth Amendment. However, a seizure of an item in plain view does implicate constitutional considerations, and to justify a warrantless seizure, there must be consent, or probable cause and exigent circumstances. Here, the Trooper saw an apparently empty baggie on the floor, and, although he thought the baggie was possibly drug packaging, an empty baggie is capable of use for lawful as well as unlawful purposes. There was no evidence that there was any characteristic of the baggie that would have indicated it was being used for an illegal purpose. Further, the Trooper did not see anything in the car or in the conduct of the occupants of the car, which, in conjunction with his observation of the baggie, would have supplied probable cause for the warrantless search. The Court concluded that the Trooper's experience,

coupled with his observation of an apparently empty baggie, was not enough to conduct a warrantless search of the car. The Court concluded that all the evidence should have been suppressed, and therefore ordered that verdicts of not guilty be entered.

Police, armed with arrest warrant, properly entered home and seized cocaine in plain view when defendant evaded arrest. Commonwealth v. Acosta, 416 Mass. 279 (1993). A detective, experienced in narcotics cases and a ten-year veteran of the police department, learned from an informant that the defendant was living on the second floor of a particular apartment building. The detective and his partner went to the apartment building, and when they reached the second floor, saw a woman at the door on the right. The door opened, and an exchange occurred of what appeared to be cocaine for money. The door closed, and the officers arrested the woman. An officer knocked on the door, and when the defendant opened it and saw the detective, he tried to shut the door and a struggle ensued. In the course of the struggle the defendant dropped a bag containing smaller bags of crack cocaine, inside the apartment. While the detective and the defendant were struggling, his partner made a protective sweep of the apartment, during which he observed a bag of cocaine, various drug paraphernalia, and three people in the bedroom.

The SJC noted that under the Fourth Amendment, a valid arrest warrant and a "reason to believe the suspect is within" is sufficient to allow police to enter a suspect's home to make an arrest. The Court noted that it need not determine whether the state constitution provides greater protection, since in the present case the police did not effect a search or seizure prior to identifying the defendant. Once the detective saw the defendant, he had authority pursuant to the warrant to arrest the defendant, and only entered the apartment when the defendant sought to evade arrest. The Court also noted that it was proper to conduct a "protective sweep" of the apartment to secure themselves against harm from other persons inside. Therefore, the evidence seized from the protective sweep were properly admitted into evidence.

C. Threshold Inquiries

Police properly conducted a threshold inquiry based on information from teletype, corroborated by their observations and knowledge that the defendant had recently been arrested for armed robbery. Commonwealth v. Willis, 415 Mass. 815 (1993). Just before 3:00 p.m., the Boston Police Department received a teletype from a Michigan police department stating that Willis,

a black male, five feet ten inches tall, with short hair, last seen wearing a blue jean jacket and pants and black tennis shoes, should be on a Greyhound bus arriving in Boston at approximately 6:50 p.m., and should be carrying a blue and white pillowcase with stripes, and no other luggage. The teletype also indicated that Willis would be armed with a thirty-eight caliber handgun, taken from his grandfather's house, along with five live rounds. The serial number of the gun, as well as the name of the person to whom the gun was registered, was given in the teletype.

At 4:00 p.m., a Sergeant of the BPD called the Michigan police department to verify the information, but the officer who had sent the teletype had gone home. At role call, the Sergeant learned that another officer had arrested Willis the previous year for armed robbery.

The Sergeant, the officer who had previously arrested Willis, and two other officers went to the bus station in plainclothes, but with their badges visible. The officers saw Willis get off the bus carrying a striped pillowcase. Three officers followed Willis with their guns drawn. The other officer went through the bus terminal and confronted Willis from the opposite direction, with his gun out and his badge visible. He announced that they were police, and told Willis to take his hand out of his pocket. The officers pat-frisked Willis, and found a gun in his pants.

At the motion to suppress hearing, one of the officers testified that they had expected the suspect to have a loaded firearm with him. The Supreme Judicial Court therefore concluded that the officers drew their weapons because they were concerned for their safety, and that that concern was reasonable.

The Court noted that the information from the teletype appeared to be based on information from an undisclosed informant, and that the informant's basis of knowledge was shown by the detail concerning the pillowcase, the serial number of the gun, and the fact that the gun was taken from the house of the defendant's grandfather. The Court concluded that the officers' observations of the defendant, who was known to them, getting off the bus carrying the distinctive pillowcase, significantly corroborated the information in the teletype, and established the informant's basis of knowledge. Moreover, although the teletype stated nothing about the informant's credibility, the corroboration of the teletype information made a sufficient showing that the information was reliable. The Court held that the police had reasonable suspicion to believe that a crime had been or was being committed, therefore justifying a threshold inquiry, but that the information did not establish probable cause to arrest the defendant.

The Court also concluded that the force used to stop the defendant (outnumbering him and approaching him with guns drawn but not pointed at him) was consistent with a threshold inquiry and not an arrest. The Court noted, however, that police are entitled to take reasonable precautions for their protection, and here were justified in believing that the defendant was armed and dangerous. Because the police were approaching a person who they reasonably suspected of being armed with a loaded, stolen handgun, and reasonably believed to have engaged in violent criminal conduct, they were justified in taking precautions against the use of the weapon against them, and conduct a threshold inquiry and pat-frisk.

D. Motions To Suppress

Occupant consented to second entry by police during undercover purchase of cocaine. Commonwealth v. Marmolejos, 35 Mass. App. Ct. 1 (1993). A police officer, while working undercover, entered a woman's (not the defendant) apartment, with her consent, to purchase narcotics. While there, the officer saw a kilo of cocaine in plain view in the apartment. He left to get the purchase money, and came back to the apartment a few minutes later. The undercover officer testified that when he returned to the apartment, the woman opened the door for him to reenter.

The Court held that the evidence supported a finding that the entry was consensual, since the occupants, who were in the midst of their efforts to execute a drug sale, were anxiously awaiting the officers return with the money. The Court noted that it made no difference that entry to the apartment was obtained by a ruse. The Court also commended the officers for their decision to secure the apartment until a search warrant could be obtained.

E. Arrest Based On Outdated Information

Where police department failed to inform officers that arrest warrant was no longer valid, arrest based on outdated warrant was improper. Commonwealth v. Hecox, 35 Mass. App. Ct. 277 (1993). An officer requested that a complaint be sought and an arrest warrant issue for the defendant for assault with intent to murder. One day after the arrest warrant issued, the defendant voluntarily appeared for arraignment and was released on personal recognizance. Five days later, the officer, acting on the assumption that the arrest warrant was still outstanding, saw the defendant in his car, and approached the car. The officer saw the defendant holding a white bag up to his face, but at that point could not identify what was in the

bag. The officer pointed his gun at the defendant, and instructed him to get out of the car. The officer conducted an initial patdown for weapons, then saw a bag of white powder on the floor which, based on his training and experience, he believed to be cocaine. At the same time, he learned that the arrest warrant was not outstanding, but, realizing that the defendant was facing a charge of possession with intent to distribute, arrested the defendant for that charge.

The Appeals Court concluded that the Commonwealth could not rely on the good faith exception to the exclusionary rule in situations such as this one in which an arrest is based on erroneous information supplied by the law enforcement authorities themselves. Instead, where there is stale information or outmoded records that are demonstrably incorrect, the Commonwealth has the burden of showing that it was not at fault in failing to update its records or to provide correct information. Because the Commonwealth here failed to introduce any evidence as to the time reasonably needed to inform police officers of the appearance of the defendant in court, it did not meet its burden of justifying the administrative delay, and the defendant's motion to suppress the evidence should have been allowed. Since without the suppressed evidence, there was no evidence to convict the defendant, the Court ordered that judgment be entered for the defendant.

II. ADMISSIONS AND CONFESSIONS

Officer's explanation of Miranda rights was not false or misleading; testimony about defendant's behavior was proper. Commonwealth v. Grenier, 415 Mass. 680 (1993). The defendant was convicted of first degree murder and armed robbery. During the investigation of the crime, the defendant voluntarily went to the police department to be questioned about a murder and robbery. At the station, the defendant read the Miranda rights aloud from a card. An officer asked if defendant had any questions; he asked the officer to explain what was meant by the statement that anything he said may be used against him. The officer testified that he told the defendant that the police wanted to get a statement from him, and that anything he told them, "which will be recorded and signed by him, at some future date can be used in court. Somebody would testify in court if, in fact, if we go to court." The SJC concluded that what the officer said was not erroneous or deceptive, and there was no indication of any intent to trick the defendant, and that he therefore voluntarily waived his Miranda rights.

While at the station, the defendant tested positive for occult blood and gave a doubtful explanation of the test

results. An officer told the defendant that the reason he had blood on him was because he was as the murder scene and assisted in the murder. The defendant dropped his head. The officer then asked the defendant if he knew when he set up the old guy for the robbery that they were going to murder him. The defendant shook his head no, then sat straight up and said "No. I don't have anything to do with any murder or robbery." The defendant argued that the officer's testimony should not have been admitted because it permitted an inference of an admission of guilt from the defendant's silence. The SJC held that the defendant's actions in hanging his head, answering the officer's question, and then sitting up straight and denying involvement in the killing was not necessarily an admission by silence, but could be seen as an admission by word and deed, and at the least was admissible as an equivocal response to an accusation of guilt. The court made it clear that if the defendant had just hung his head and paused, and had not said "no," his response would not have been admissible as an equivocal response.

After the defendant said he did not know anything about the murder, the officer told the defendant he did not believe him. The defendant became noticeably nervous, and said, in response to a question, that he did not want to give a statement of the truth of what happened that day and did not want to talk any more. The defendant argued that this testimony invited the jury to infer guilt from the defendant's assertion of his right to remain silent. The SJC concluded that the defendant's decision to terminate questioning following a question whether he wanted to give the police a truthful statement could lead to an inference of an admission of guilt, and should not have been admitted. However, under the circumstances of the case, admission of the testimony did not require reversal.

Statement made by defendant in response to conversation among police officers was not interrogation. Commonwealth v. Mitchell, 35 Mass. App. Ct. 909 (1993). The victim of a rape described her attacker as wearing "pinkish color jeans." The defendant was picked up for public drinking, and was given Miranda warnings at his booking. The only questions asked were routine ones incident to booking, e.g., name, address, parents' names, social security number. Two officers in the booking room were engaged in a conversation with their lieutenant about whether the defendant resembled the description of the rape suspect, particularly whether his clothing met the description, and whether he should be fingerprinted and photographed. One officer commented that she worked as a plain clothes officer and "[t]his is how I usually dress," and said that "usually people wear the same clothes every day." At this point, the

defendant, who overheard the conversation, interjected, "I didn't have these clothes on yesterday . . . I had pink pants on." At the time of the defendant's statement, the officer was unaware that the day before, the victim had given the police a detailed description of her assailant including that he wore pink pants.

The Appeals Court held that although the defendant was in custody, his statement was not the product of interrogation. The Court noted that there was no evidence suggesting that the conversation among the officers was an attempt to force the defendant to make incriminating statements, and that the evidence indicated that the officers were not aware of the significance of the defendant having worn pink pants. The defendant spoke spontaneously and voluntarily, and his unsolicited statement was admissible.

III. NARCOTICS

Evidence insufficient to establish defendant's possession of drugs found in bedroom. Commonwealth v. Cruz, 34 Mass. App. Ct. 619 (1993). Police conducted a search of a sparsely furnished two-bedroom apartment on the second floor of a three-family house pursuant to a search warrant. Upon arrival, an officer saw the defendant run from the living room window. The officers broke down the front door of the apartment, and as they ran in, saw the defendant running from the living room toward the kitchen, holding a television remote control. Two other men were in the apartment. A couch and television set were in the living room. The front bedroom contained a mattress, a dresser, a box of stereo equipment, and some men's shirts in a closet. In addition, in the front bedroom the police found 69.26 grams of cocaine, a small amount of marijuana, and packaging materials for the cocaine. No drugs were found on the defendant or elsewhere in the apartment. A co-defendant located in the front bedroom had three small bags of cocaine, a key to the apartment, and some cash on his person. An officer testified that when asked where he lived, the defendant stated, "Here."

An experienced narcotics officer testified that the landlord named on a rent receipt found in the apartment frequently rented apartments to drug dealers, and, based on that information, the sparse furnishings, the quantity of drugs and packaging materials, and the absence of any diluting material, in the officer's opinion the apartment was being used for the retail sale of cocaine.

The court concluded that, although there was sufficient circumstantial evidence to support an inference that drugs were being packaged for sale in the front bedroom, and that the

defendant knew of the presence of the drugs, there was insufficient evidence that the defendant had the ability and intention to control the cocaine. Mere presence in the vicinity of a controlled substance, even if one knows that the substance is there, does not amount to possession. Nor is possession proved simply through the defendant's association with a person who controlled the contraband, or by sharing the premises where the narcotics were found.

Although the defendant admitted that he lived in the apartment, the drug activity was limited to the front bedroom, not a common area. The defendant was never tied to the front bedroom. Other evidence, including a key to the apartment found on the co-defendant who was in the front bedroom, suggested that the co-defendant also lived in the apartment, and there was compelling evidence tying the drugs to him. There was no basis for assuming that the defendant slept in the front bedroom since there was a second bedroom in the apartment and a couch in the living room. No drugs were found on the defendant.

Finally, the fact that the defendant ran from the window when the police arrived proved neither that he attempted to flee nor that he made any effort to protect the contraband, and did not establish that he had the ability and intent to control the drugs.

Defense of necessity not available to defendants charged with illegal possession and distribution of hypodermic needles who claimed they violated law to stop spread of AIDS. Commonwealth v. Leno, 415 Mass. 835 (1993). The defendants were arrested after distributing clean needles to addicts, and charged with unauthorized possession and distribution of instruments to administer controlled substances. At trial, the defendants sought to raise a defense of "necessity" by claiming they had violated the law in order to stop the spread of the AIDS virus among IV drug users and their families. The defendants introduced evidence that they distributed the needles as a matter of conscience because they were opposed to Massachusetts law prohibiting needle exchange programs, and that needle exchange programs are effective in reducing the spread of the AIDS virus among intravenous drug users and their families. The trial judge refused to instruct the jury on the defense of necessity, and the defendants were convicted.

To be entitled to an instruction on the defense of necessity, the defendants must show that: (1) they are faced with a clear and imminent danger; (2) they can reasonably expect their action will be effective as the direct cause of abating the danger; (3) there is no legal alternative which will be effective in abating the danger; and (4) the

Legislature has not acted to preclude the defense by a clear and deliberate choice regarding the values at issue. The SJC ruled that the defense of necessity was unavailable to the defendants because they failed to show the danger they sought to avoid by their illegal conduct (the spread of AIDS among IV drug users) was "clear and imminent," as opposed to "debatable or speculative." In so ruling, the Court noted that the prevention of possible future harm does not excuse a current violation of the law in anticipation of the eventual over-all benefit to the public. The Court also noted that the Legislature has determined that it wants to control the distribution of drug-related paraphernalia, and whether that statute is wise or effective is not within the province of the court.

IV. IDENTIFICATION

Photographic array which included photo of defendant that victim had tentatively identified previously was not unnecessarily suggestive. Commonwealth v. Dinkins, 415 Mass. 715 (1993). The defendant and his companion waited for the victims to go to their automobiles, then went to the cars and opened fire on them at close range. One victim was killed, and another, Rodriguez, was shot at but was not injured. The defendant had propped himself up on the front bumper of Rodriguez's car and shot at him. Rodriguez recognized the defendant and his companion, having seen the two sitting on a porch before the shooting, and recognized the defendant as coming into the family market several times.

Almost immediately after the shooting Rodriguez was shown a book of approximately 200 photographs at the police station. He was extremely upset, nervous and fearful at the time, and became more upset when he saw the defendant's picture, saying that the defendant looked like the man, but he wasn't sure. Over the course of the next month the police showed Rodriguez three additional, different arrays of photographs, none of which contained the defendant's picture. Rodriguez did not make any identification from those arrays. Rodriguez then asked the police if he could look at some pictures again, and the police put together another array containing nine pictures. One picture was another print of the defendant's photo that Rodriguez had tentatively identified, and another was a photo from a previous array. At no time did the police suggest that Rodriguez should select any particular picture. Rodriguez identified the defendant as the shooter, saying he was sure.

The SJC held that Rodriguez's photographic identification was not unnecessarily suggestive. The inclusion of the same

photo of the defendant, taken from the initial array of over 200 pictures, did not require suppression. Because Rodriguez had tentatively identified the defendant from the original book of photographs, it was reasonable for the police to include the defendant's picture in the later array.

V. MOTOR VEHICLE OFFENSES

Three day delay in issuing citation did not justify dismissal of complaint for operating to endanger, speeding, and failure to stay within marked lanes. Commonwealth v. Cameron, 416 Mass. 314 (1993). An officer arrived at the scene of an accident in which a car operated by the defendant struck a teenage boy on a bicycle. The boy, apparently seriously injured, was lying on the ground. The defendant, who had run behind a house, appeared to be in shock, but gave his license and registration to the officer. The defendant left the scene with a friend, and the officer, joined by another officer, worked at the scene for the next two hours. The officer learned that the boy's life was in danger. The next day, after further investigation, the officer concluded that the defendant had been speeding and had crossed the solid double line before striking the boy. No further investigation was needed before issuing a citation to the defendant. The officer was not on duty the next two days. On the third day, he learned that the boy's condition had stabilized. He then informed the defendant that a citation would issue, and the citation was issued that day.

G.L. c. 90C, §2 provides that a citation should be given at the time of the violation, and that failure to do so shall constitute a defense. There are exceptions, including when there is reasonable need for additional time to determine the nature of the violation, and where the court finds that a circumstance, not inconsistent with the purpose of the statute, justifies the failure. One of the purposes of §2, the "no-fix" law, is to afford prompt and definite notice of the nature of the alleged offense. The Appeals Court had concluded that the Commonwealth provided no justification for the failure to deliver or mail a citation the day after the accident.

The SJC reversed the Appeals Court decision, noting that in some circumstances the seriousness of the accident may justify refusal to dismiss a complaint when an officer fails to issue a citation seasonably. The Court stated that when the most serious of personal injuries is involved, the purposes of §2 are made unimportant as against the public interest in prosecution of the violators. The Court concluded that because there was an obvious, life-threatening injury in this case, and no purpose of §2 was being thwarted, and because the police

were not seriously deficient or negligent in their handling of the matter, there was justification for the three-day delay in issuing the citation, and the case should not have been dismissed.

Evidence obtained during roadblock should have been suppressed because police did not follow guidelines on sight selection. Commonwealth v. Donnelly, 34 Mass. App. Ct. 953 (1993). The defendant was arrested for operating a motor vehicle under the influence of alcohol in violation of G.L. c. 90, § 24, after being stopped at a roadblock. The defendant filed a motion to suppress the evidence obtained as a result of the roadblock.

A roadblock seizure for the purpose of detecting a drunk driver is reasonable under the state constitution if the roadblock meets standard, neutral guidelines, and is conducted pursuant to a plan devised in advance by law enforcement supervisory personnel. Under Massachusetts law, the site selected for a roadblock must be a "problem area" in which accidents or prior arrests for drunken driving have occurred. In addition, the State Police guidelines (Policy TRF-13 and Procedure TRF-13A) add that site selection must be based on "selective enforcement identifiers" as to time, day of week, and location. Strict compliance with the guidelines is necessary; the SJC has stated that anything short of strict compliance is characterized as no compliance.

In October 1989, a state police captain wrote to a duty and traffic programs officer at the barracks directing him to conduct a roadblock on Route 18 at a specific date and time. However, the specific location of the roadblock on Route 18, which is over six miles long, was left to the discretion of the officer. The guidelines call for a site selection based on prior alcohol-related incidents. The only evidence of arrests or prior accidents for the site selected was a letter from two years earlier indicating that, of 77 OUI arrests made during 1987, 18 were on Route 18. There was evidence that there had been two prior roadblocks in the area in 1989, but there was no information on the total arrests, the OUI arrests, or the breath test results from these prior roadblocks.

The court concluded that because there was no recent, pertinent information regarding the number of alcohol-related arrests in the selected area, the Commonwealth had converted the site selection from a choice based on fresh, reliable information to one made by the State Police in their discretion. The Commonwealth had not adhered to its own guidelines, and all the evidence obtained should have been suppressed. The Court therefore ordered that judgment be entered for the defendant.

VI. SEX OFFENSES

Rape verdict set aside and indictment dismissed because the Commonwealth approved the destruction of the victim's aborted fetus. Commonwealth v. Sasville, 35 Mass. App. Ct. 15 (1993). The defendant was convicted of rape, and the only evidence of the rape was the victim's testimony. On March 30, 1988, the victim determined that she was pregnant, and told her mother that she had been raped by the defendant on or about October 30, 1987. The victim claimed that her pregnancy was the result of the rape. The victim's stepfather contacted the police at that time. On April 4, 1988, the victim's mother told the police that an ultrasound showed the gestational age of the fetus to be consistent with the rape occurring on October 30. She also told the police that the victim had an abortion on April 2, and that the doctor preserved the fetus in the event the district attorney's office wanted to perform blood tests. The district attorney's office told the police that blood tests weren't necessary, and the police relayed that information to the doctor and told him the fetus could be destroyed. That same day, a complaint issued against the defendant for rape.

The Appeals Court concluded that the Commonwealth had destroyed potentially exculpatory evidence, and that dismissal of the indictment was warranted. A blood test of the fetus could have established the defendant's nonpaternity, and, although that evidence would not have been determinative of whether the defendant raped the victim, it could have been used to impeach the victim's credibility since she claimed that the pregnancy was the result of the defendant raping her. The Court noted that this was of particular importance in this case since the only evidence of the rape was the victim's testimony.

The Court cautioned that it was not holding that doctors must preserve fetuses which have resulted from alleged rape, or that the Commonwealth must perform blood tests on a fetus where there is an abortion after an alleged rape, and stressed that its decision was limited to the facts of this particular case.

Judge properly denied defendant's request to cross-examine victim's grandmother about her two prior accusations of rape of the victim by other family members. Commonwealth v. Quegan, 35 Mass. App. Ct. 129 (1993). The defendant was convicted of forcible rape of his daughter. During trial, defense counsel sought to question the victim's grandmother about two prior allegations by her of sexual abuse of the victim by other family members. The defendant argued that the evidence was relevant to show that the grandmother was a liar who had used the allegations as a device to secure custody of the victim. The trial judge determined that the evidence was not relevant.

The Appeals Court concluded that the trial judge properly refused to allow the line of questioning for three reasons. First, the grandmother's credibility was not a central issue at trial, since she was merely a fresh complaint witness corroborating the victim's disclosures. Second, the defense presented no evidence that the prior accusations had ever been used by the grandmother to secure custody of the victim. Finally, and most significantly, the Appeals Court noted that there was no evidence offered by the defendant that the prior accusations were false, and without evidence of falsity, the prior allegations were irrelevant to the grandmother's credibility.

Exclusion of evidence of the victim's prior knowledge of sexual matters and of allegations of sexual abuse was proper. Commonwealth v. Pyne, 35 Mass. App. Ct. 36 (1993). The defendant was convicted of statutory rape and indecent assault and battery upon a child under age fourteen. The victim was thirteen years old at the time of the incident. At trial, the defendant sought to introduce evidence of prior sexual abuse of the victim by others to demonstrate that he had come by his knowledge of sexual relations through that experience, rather than through the acts he claimed occurred with the defendant. Noting that the victim spoke of "normal sex" and "oral sex," and understood the words "penis" and "vagina," the Appeals Court concluded that the victim's testimony did not demonstrate knowledge of sexual matters atypical of a child his age, and the evidence was properly excluded.

The defendant also sought to introduce evidence of the victim's prior exposure to complaints of abuse for the purpose of showing that he had learned the manipulative power of alleging abuse. The defendant alleged this ultimately would bear on the victim's bias against her. The Appeals Court concluded that the trial judge properly excluded this evidence because there was other evidence of bias, and because the defendant was not prepared to offer evidence of the falsity of the prior allegations of abuse.

Finally, the defendant sought to introduce evidence of a prior false allegations of rape made by the victim. The defense counsel brought this allegation to the attention of the judge on the third day of trial, indicating he had just been told of the allegation. The defense counsel claimed that a woman claimed that the victim and his mother had falsely accused her of raping the victim. The trial court refused to allow the defense counsel to conduct a voir dire of the woman and the victim to determine whether the accusations were made and whether they were withdrawn. The Appeals Court held that this refusal was error, because, if in fact the victim had made

a prior false allegation of rape, it would bear on the credibility of his testimony about the defendant. The Appeals Court remanded the case to the Superior Court for an evidentiary hearing on the defendant's motion for a new trial at which time evidence of the prior allegation could be presented.

VII. MISCELLANEOUS

A. Firearms Licenses

Refusal to cooperate with investigation of random shootings, where there was a continuing serious danger to public safety, was valid basis for revocation of license to carry firearm. Godfrey v. Chief of Police of Wellesley, 35 Mass. App. Ct. 42 (1993). The police were investigating a series of random shootings. They attempted to speak with the plaintiff about the shootings because they had information that the gun used might have belonged to him and that it might have been disposed of near an elementary school. The plaintiff invoked his constitutional rights and refused to cooperate with the police. The chief stated that, while he respected the plaintiff's constitutional rights, given the serious danger that continued to exist, he determined that the plaintiff was no longer a suitable person to be licensed to carry a firearm, and revoked his license to carry a firearm.

The Appeals Court held that, when an applicant seeks review of the police chief's decision in the district court, the only question is whether the chief had a reasonable ground for revoking the license, not whether the judge would have made the same decision. The Court concluded that although the plaintiff may have been acting within his rights in refusing to incriminate himself, the chief acted properly in revoking his license given the plaintiff's refusal to cooperate in light of the continuing and serious danger to the safety of the public, especially young children.

Application to possess machine gun was insufficient to determine whether applicant was bona fide collector of firearms. O'Malley v. Chief of Police of Stoughton, 35 Mass. App. Ct. 49 (1993). The plaintiff applied for a license to possess a machine gun, stating on his application only that he was a bona fide collector of firearms. Licenses to possess machine guns can only be issued to certain firearms instructors or a "bona fide collector of firearms." The regulations promulgated by the Commissioner of the Department of Public Safety define a "bona fide collector" as someone who acquires firearms for display, research, investment, or other lawful

purposes. The chief of police refused to issue the license, concluding that there was insufficient information upon which to determine whether the plaintiff was a bona fide firearms collector.

The Appeals Court concluded that the chief had a reasonable ground for refusing to grant the plaintiff a license to possess a machine gun. The court noted that whether or not the plaintiff was a bona fide collector was a determination for the chief, and not the applicant, and it was therefore irrelevant that the plaintiff described himself as a bona fide collector in his application. The court stated that whether an individual is a bona fide collector depends upon the purpose for which the applicant collects firearms, noting that it would have been an abuse of discretion for the chief to issue a license without first knowing the purpose for the plaintiff's collection.

During the court proceedings, the plaintiff indicated that he collected firearms for the purpose of his "contemplation and enjoyment," and that his weapons were investments in that he hoped to be able to sell them at a later date at a higher price. The Appeals Court concluded that personal enjoyment and possible future profit were so dissimilar to the purposes for collection set forth in the regulation that they constituted a reasonable ground for refusing to grant the license.

B. Particular Offenses

Robbery conviction reversed because jury was not instructed that defendant would not have specific intent to steal if he honestly and reasonably thought money taken was owed to him. Commonwealth v. Newhook, 34 Mass. App. Ct. 960 (1993). The victim stopped his car on Route 128 and picked up the defendant, who was hitchhiking, and agreed to drive the defendant to a certain location in return for a five dollar payment for gas. When the victim stopped to drop off the defendant, the defendant announced that he was giving the victim a fifty-dollar bill. The victim got out forty-five dollars to give the defendant change, and then discovered that the bill the defendant handed him was actually a ten-dollar bill. The defendant insisted that he must have dropped the fifty-dollar bill in the car, and searched the car and the area around it until the victim announced that he had to leave. The defendant then accused the victim of stealing the fifty-dollar bill, and grabbed the forty-five dollars from the victim's hand. The victim struggled with the defendant until the defendant pulled out a knife and cut the victim. The defendant was charged with armed robbery and assault and battery by means of a dangerous weapon.

The defendant's defense at trial was that he honestly and reasonably believed that the money he took from the victim represented a debt actually due him from the victim. A person who honestly and reasonably holds such a belief does not have the required specific intent to steal, and therefore cannot be guilty of robbery. Because the judge failed to instruct the jury about this defense and about the requirement that the prosecution disprove the defense beyond a reasonable doubt, the defendant's conviction for robbery was reversed. The court noted that its decision did not prevent convictions relating to assault or the use of a dangerous weapon in such circumstances, and the defendant's conviction for assault and battery with a dangerous weapon was affirmed.

Circumstantial evidence of arson sufficient to justify conviction. Commonwealth v. Robinson, 34 Mass. App. Ct. 610 (1993). The defendant discovered that his wife was having an affair with Norris, a family friend who happened to own an antique Jaguar. After a series of events, including the defendant threatening Norris's life, informing Norris's wife about the affair, and filing a civil action against Norris for intentional infliction of emotional distress, Norris's Jaguar was destroyed by a fire. The defendant presented an alibi, supported by travel records, that he was out of state on a business trip at the time of the fire. A few days after the fire, the defendant's wife discovered that he had second and third degree burns on his chin, neck, and chest, which the defendant claimed were caused by a flareup when he tried to light a gas grill. The case remained unsolved for a year until the defendant's wife searched his office and found other travel records which contradicted the defendant's alibi. She turned the records over to the police.

The Appeals Court noted that arsonists are "furtive criminals," and can often be brought to justice only by a "web of circumstantial evidence." The Court concluded that the confluence of facts in the present case, including the defendant's obvious motive, opportunity to commit the crime based on the travel records discovered by his wife, his false alibi, and his injuries, constituted sufficient evidence to establish that the defendant was guilty of arson.

C. Civil Liability

Plaintiff did not establish that sheriff acted with deliberate indifference to inmate's safety. Baptiste v. Sheriff of Bristol County, 35 Mass. App. Ct. 119 (1993). An inmate at the Bristol County Correctional Facility was fatally stabbed by a pretrial detainee with a pair of scissors taken from the prison

barbershop. The inmate's mother, the plaintiff, brought suit under 42 U.S.C. § 1983 against the sheriff alleging that he was deliberately indifferent to her son's personal security.

The Appeals Court affirmed the granting of summary judgment for the sheriff, holding that the plaintiff could not prove that the sheriff had been deliberately indifferent to his personal security. Specifically, the Court held that although the inmate had a history of violent and abusive behavior, there was nothing in his behavior from the day of his arrival until the day of the stabbing to put anyone on notice that supervisory or psychiatric intervention was necessary. The Court also concluded that there was no wanton or callous disregard for the need to train correctional officers, since all but one officer testified to many years of on-the-job training as well as attendance at various programs and courses. In any event, there was no causal link between the inmate's death and an alleged failure to train the responding officer, since the stabbing occurred before he saw the struggle. Finally, the Court concluded that the testimony about the security of the barbershop did not show that the defendants were aware that inmates could easily obtain scissors from the barbershop, and showed, at best, that the sheriff failed to recognize that, in spite of the existing security measures, there was yet another possible means of access to the scissors. Although the defendants may have been negligent, the Court held that the high standard of deliberate indifference necessary to establish a § 1983 civil rights claim was not met.

D. Evidence

Admission of videotape of defendant shortly after arrest proper to negate claim that he was beaten prior to interrogation. Commonwealth v. Adams, 416 Mass. 55 (1993). During the trial of two defendants for first-degree murder, armed robbery, and unlawfully carrying a firearm, the judge admitted a videotape of one of the defendants smiling into the camera just after his arrest. The defendant claimed that the videotape was not relevant to any issue at trial, and was introduced only to show that he lacked remorse. The trial judge concluded that the evidence was relevant because the defendant argued that the police had beaten him prior to interrogation (which occurred shortly before the videotaping). The Supreme Judicial Court concluded that although still photographs were taken around the same time showing the defendant's physical condition, the trial judge did not abuse his discretion in holding that the probative value of the videotape outweighed any prejudicial effect.

Where cross-examination of defendant suggested he had recently contrived his testimony, judge should have permitted evidence of prior consistent statement. Commonwealth v. Brookins, 416 Mass. 97 (1993). A police detective saw a man, who was standing with two other males, fire a gun at a group of people and then flee. The detective and a fellow officer pursued all three men, but lost sight of them. The second officer, who did not see the shooting, saw the defendant running down the street and began to chase him with his gun drawn. The defendant began trying to enter passing automobiles, and was knocked down by a car. The officer seized the defendant and took him to the police station. There, the detective identified the defendant as the shooter.

At trial, the defendant testified that he ran because, from his perspective, he was being chased by a man (in street-clothes) with a gun. In a series of questions during cross-examination, the prosecutor attempted to establish that the defendant was aware before trial of the likely testimony against him. The defendant argued that this line of questioning suggested to the jury that he had recently fabricated his version of events, tailoring his testimony to be consistent with the Commonwealth's evidence. The defendant therefore sought to present the testimony of a court psychiatrist who spoke with the defendant the day of his arrest, before the defendant was made aware of the likely testimony of the Commonwealth's witnesses, who would testify that the defendant told him essentially what the defendant told the jury. The trial judge did not permit the psychiatrist to testify.

The Supreme Judicial Court granted the defendant a new trial, concluding that the psychiatrist's testimony about the defendant's prior consistent statement should have been admitted. The Court noted that, although the prosecutor did not explicitly argue that the defendant's testimony was contrived, the focus of cross-examination strongly implied as much. Therefore, this was one of the limited circumstances in which a witness's prior out-of-court statement which was consistent with his trial statement should have been admitted to counter the implication of recent contrivance.

Procedures changed for defendant's access to privileged records of witness. Commonwealth v. Bishop, 416 Mass. 169 (1993). The defendant was indicted for molesting two children. Prior to trial, the defendant moved to compel production of the victim's psychological records. The judge reviewed the records in camera, and did not disclose the records to defense counsel or to the prosecutor. The trial court allowed access to the results of physical examinations and laboratory tests, and

refused access to entries dealing with psychiatric and mental health assessments and treatment. The defendant was convicted on three indictments for unlawful or unnatural sexual intercourse, and abuse of a child under the age of sixteen.

The defendant, relying on Commonwealth v. Stockhammer, 409 Mass. 867 (1991), argued that the judge's refusal to allow defense counsel to review the psychological records violated his right to a fair trial. The Supreme Judicial Court reconsidered the issue of when a criminal defendant is entitled to access to a victim's privileged records of treatment and counseling. The SJC stressed that a defendant charged with rape or sexual abuse is not entitled to access to a victim's privileged records in all circumstances. Instead, the Supreme Judicial Court issued new guidelines for access to records protected by a qualified privilege, such as psychiatric counseling records and physicians records, in limited circumstances.

The Court held that as a threshold matter, the defendant must show a likelihood that the privileged records contain relevant evidence. When such a showing is made, the judge shall review the records in camera to determine whether they are relevant. If the judge determines that any records are relevant, the prosecutor and defense counsel will have access to the material to permit argument on whether disclosure of the evidence at trial is required to ensure the defendant a fair trial. The defendant has the burden to demonstrate that use of the evidence is necessary to obtain a fair trial.

Although the Bishop decision sheds new light on the issue of when a defendant will be permitted access to, and use of, records protected by a qualified privilege, the case does not govern access to records of an absolutely privileged nature. This issue was raised in two recent cases, In Re Rape Crisis Services of Greater Lowell, Inc., 416 Mass. 190 (1993), and In Re Rape Crisis Program of Worcester, Inc., 416 Mass. 1001 (1993). Those cases dealt with the question of when a defendant was entitled to rape crisis counseling records, which are protected by an absolute statutory privilege with no exceptions. In both cases, however, the SJC declined to consider the issue. In the Lowell case, the Court determined that the case was moot because the judge vacated the contempt order against the center after the defendant pled guilty. And in the Worcester case, the Court remanded the matter to the Superior Court for a determination consistent with Bishop.

E. Standing To Challenge Executor

Where executor of estate is suspected of murder, District Attorney had standing to seek discharge of executor, and probate court properly removed executor. District Attorney for the Norfolk District v. Magraw, 34 Mass. App. Ct. 713 (1993). Magraw was a suspect in the murder of his wife. The grand jury investigating her death was interested in what she might have said about her husband, from whom she was separated, to her lawyer and psychotherapist. In his capacity as the executor of his wife's estate, Magraw refused to waive her attorney-client and psychotherapist-patient privileges, effectively preventing her lawyer and therapist from testifying before the grand jury. The district attorney petitioned the probate court to remove the husband as executor because his position as a prime target of the investigation into the wife's murder made him unsuitable to discharge the fiduciary duties required of an executor.

In concluding that the district attorney had standing to move for the discharge of the executor, the Court reasoned that, in seeking the privileged information, the district attorney represents the public interest in prosecuting those responsible for the victim's death. Because the district attorney has a legal interest in the privileged communications, it is appropriate for him to move for discharge of the executor. The Court noted that even if the District Attorney did not have standing, the probate court could, sua sponte, order removal of an unsuitable executor.

Because Magraw has an interest in using his wife's privileges for his personal benefit, he has an interest in conflict with his duty as executor, and can be removed. The Court concluded that a disinterested executor would conclude that the wife's interests would best be served by waiving the privileges to make available evidence leading to the identification of her murderer.

F. Grand Jury Secrecy

Evidence from concluded grand jury investigation is not subject to public disclosure. In The Matter of a John Doe Grand Jury Investigation, 415 Mass. 727 (1993). In December, 1992, pursuant to a motion by WBZ-TV4, the Superior Court ordered that the Suffolk District Attorney disclose a videotape of a lineup conducted at the request of the grand jury investigating the death of Carol DiMaiti Stuart, during which Charles Stuart allegedly identified the assailant as William Bennett. The lineup was conducted in December, 1989, and Charles Stuart died shortly thereafter, apparently as a result of suicide. In

November, 1990, the grand jury concluded its investigation and returned indictments against Matthew Stuart and John McMahon. In November, 1992, Stuart and McMahon pleaded guilty to several charges. The Superior Court's disclosure order was based on the facts that the grand jury had concluded its investigation, the criminal prosecutions resulting therefrom had concluded, many of the details of the lineup had been publicly disclosed, and Bennett, Stuart, and McMahon consented to disclosure.

The Supreme Judicial Court reversed the Superior Court order, holding that the videotape of the lineup is protected from public disclosure by grand jury secrecy. The Court held that the fact that the lineup was conducted outside the presence of the grand jury, but at their request, did not change its characteristic as grand jury material, protected by grand jury secrecy. The Court noted that the requirement of grand jury secrecy is deeply rooted in the common law, and serves many purposes, including encouraging witnesses to come forward and testify freely, and encouraging free grand jury deliberations. The Court concluded that in evaluating these interests, courts must consider not only the immediate effect of disclosure on the particular grand jury, but also the possible effect on the functioning of future grand juries. The Court noted that Bennett, McMahon, and Stuart do not speak for the other persons in the lineup, or for the grand jurors who believed the proceedings would be kept secret. The Court concluded that if it approved disclosure whenever the persons directly affected consented, witnesses may refuse to come forward or may tailor their testimony in anticipation of public disclosure. Moreover, ordering disclosure may inhibit free deliberations because grand jurors will be aware that, upon conclusion of their deliberations, they will be subject to pressure to consent to disclosure.

G. Probable Cause Determinations After Warrantless Arrests

Persons arrested without warrant entitled to probable cause determination within 24 hours of arrest to justify further detention. Jenkins v. Chief Justice of the District Court Department, 416 Mass. 221 (1993). In May, 1991, the United States Supreme Court decided County of Riverside v. McLaughlin, in which it held that, under the Fourth Amendment, a person arrested without a warrant is entitled to judicial determination that there was probable cause to justify the arrest within forty-eight hours of arrest as a prerequisite to continued detention. In Jenkins, the Supreme Judicial Court held that the state constitution requires that persons arrested without warrants be provided a judicial determination of probable cause within 24 hours of arrest as a prerequisite to

prolonged detention. The Court held that the determination is governed by the same legal standards as apply to the issuance of arrest warrants. Therefore, the determination need not be made by a judge, but can be made by any "neutral and detached magistrate." The determination can be made ex parte, and the arrestee is not entitled to assistance of counsel. The arresting officer's documentation of probable cause may be oral or written. Finally, the determination of probable cause need not be reviewed at arraignment.

This case is now pending before a single justice of the SJC, who will oversee implementation of the constitutional requirements set forth in the decision. The single justice has given the respondents, the Chief Justices of the District Court Department and of the Boston Municipal Court Department, until December 27 to present a plan to the Court, and, following a hearing, will presumably give the courts an additional amount of time to implement the plan.

If you have any questions or comments concerning this case, please feel free to call Assistant Attorney General LaDonna Hatton at (617) 72702200 ext. 2842.

ASSISTANCE AND CONTACTS AT THE OFFICE OF THE ATTORNEY GENERAL

Below is a list of individuals at the Office of the Attorney General who you can call for assistance. The main office number for all extensions listed below is (617) 727-2200. The office address is: Office of the Attorney General, One Ashburton Place, Boston, MA 02108.

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Law Enforcement Newsletter

FROM THE OFFICE OF THE
Attorney General
For The Commonwealth of Massachusetts

Scott Harshbarger
Attorney General

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May, 1994

Letter from the Attorney General

A Plan to Reduce Illegal Guns and Violence in Our Society

To Members of the Law Enforcement and Criminal Justice Community:

Rarely does a day pass when we don't hear of yet another act of random and senseless violence.

A teenager is shot waiting at a subway station. A mother is killed by an abusive partner. An elderly woman is assaulted in her home.

Such violence casts a shadow of fear onto our streets, into our homes and in our schools, whether it occurred in Massachusetts or elsewhere in the country.

A Harvard University study found that 71 percent of American teenagers fear for their safety because of the accessibility of handguns. Meanwhile, nearly 40 percent of those teens feel they will likely die at a young age because of the large number of guns in our country.

And their fears are not unfounded. Gunshot wounds are the leading cause of death for teenage boys.

Meanwhile, gun violence is exacting a heavy economic toll on society. When lifetime medical expenses and loss of productivity are included, firearm injuries cost Americans $14.4 billion each year.

The deaths, the statistics and the fear are simply unacceptable.

Stricter gun laws are one way to cut down the violence, but that is only a part of the solution. Stronger laws and vigorous

prosecution may reduce the number of tragedies, but such measures will only work if they are part of a larger comprehensive solution. As Attorney General, and as the former District Attorney of Middlesex County for eight years, one of my priorities has been to combine the prosecution of serious violent and repeat offenders with violence prevention policies and programs. We have sought to identify particular areas that contribute to the rising tide of violence, such as:

1) Addressing the supply of guns as a priority. There is no doubt there is a correlation between the number of illegal guns on the street and the violence which is occurring in our society.

2) Working to end domestic violence in our homes. When adults and children live in a home of violence, it extends beyond the family. It eventually touches entire communities. Guns may be the tool of that violence, but the underlying causes must also be addressed.

3) Not letting our youth fall victim to violence. We as a country mortgage our future when we allow our children to grow up with violence in their homes, neighborhoods and schools. That is why my office is focusing resources and attention on the next generation through violence prevention and peer mediation programs in schools throughout the state.

4) Targeting, through priority prosecution programs, both hard core juvenile and adult offenders, for swift and effective prosecution.

There are no easy solutions or magic panaceas. Only through a comprehensive program of priority prosecution and violence prevention, as I will outline below, can we achieve positive results.

Prosecuting Serious Gun, Gang and Drug Cases

Prevention efforts are essential to long-term success in stopping the violence in our society, much of it escalated by the availability of illegal guns. In addition, to the preventative efforts I am proposing, as District Attorney and as Attorney General I have dedicated resources to the prosecution of serious gun, gang and drug cases.

Through our Urban Violence Task Force, Assistant Attorneys General working with the Suffolk County District Attorney's Office and in our Dorchester Safe Neighborhood Initiative have prosecuted cases that have resulted in the incarceration of approximately 200 violent criminals.

The Safe Neighborhood Initiative is an initiative originally undertaken by my office, the Suffolk County District Attorney's Office and the Boston Police Department in a Dorchester neighborhood. The collaboration, recently joined by Mayor Menino and the Governor, has led to the prosecution of dozens of gang members and drug dealers, along with the formation of a neighborhood advisory council to address issues of crime prevention and economic revitalization. I recently met with United States Attorney General Janet Reno, who expressed interest in the cooperative and comprehensive approach involved in this initiative.

In 1994, the close cooperation between the A.G.'s Office, the Suffolk County District Attorneys Office and U.S. Attorney Don Stern's Office also has resulted in the federal prosecution of several serious gun cases. By sharing information and pooling resources, our prosecutors are better able to determine where to most effectively prosecute a particular defendant based on the facts of the case and the law available to each jurisdiction.

In addition, approximately 40 different Assistant Attorneys General have worked with the District Attorneys in Plymouth, Essex and Middlesex Counties to prosecute criminal cases in our urban courts.

Slowing The Flow of Guns: Legislative Remedies

The priority prosecution of serious gun cases is essential to any effort to reduce the violence in our society. However, it is only one part of the solution. It is also time to comprehensively address the illegal supply of guns. The number of individuals equipped with illegal firearms must be reduced. There are simply too many guns on the streets and too few safeguards for the public health and welfare.

From October of 1989 to June of 1992, the federal Bureau of Alcohol, Tobacco and Firearms conducted a firearms trace project in Boston. Some startling statistics turned up:

* 74 percent of the guns recovered were handguns;

* About 61 percent of the guns came from outside Massachusetts;

* The six key states of origin were Virginia, Texas, Georgia, Florida, Alabama and New Hampshire;

* About 82 percent of the firearms recovered from gang members were handguns.

As this study illustrates, the ready availability of illegal firearms, particularly handguns, is alarming. These weapons all too often fall into the hands of our young citizens.

To cut down the supply of guns, we must:

* Enforce uniformly the Bartley-Fox Gun Law and enact stricter penalties for the illegal sale of guns.

* Create a new and separate crime of illegal sale of a firearm, rifle, shotgun or machine gun to a juvenile.

* Create the crime of "felon in possession", which would subject anyone caught with any sort of gun who has been convicted of three prior drug-related or violent crimes to a maximum 10-year prison sentence.

* Enact a bill creating the crime of drive-by shootings, with appropriate severe prison sentences.

* Restrict domestic violence batterers' access to firearms.

* Tighten out-of-state gun buyer standards.

* Require Firearm Identification (FID) Cards to be renewed every five years.

* Ban the sale and possession of guns to and by anyone under the age of 21.

* Ban assault weapons throughout the state.

Preventing Violence in the Home: Further Legislative Protection

When examining the gun issue, it is critical to realize that the problem reaches beyond our streets and urban centers. It

touches our homes and our families and tears at the very fabric of our society.

For example, in June of 1993, a 19-year-old Springfield woman was murdered by her boyfriend of four years. He had been released from jail five days earlier after serving two months of a one-year sentence for violating a restraining order. As she and the couple's daughter sat in a car waiting for a friend, the estranged boyfriend fired six shots through the windshield, killing the woman and seriously injuring the child. He then shot himself.

This tragic story reveals in frightening detail the reality of domestic violence in this state. In 1990, a woman was killed every 22 days by her batterer in Massachusetts. In 1992, a batterer killed a woman every 13 days. Between 1986 and 1991, 40 percent of female victims of spousal homicide were killed by firearms.

It is a tragedy that must be approached comprehensively so we are not just slowing the violence, but also addressing the underlying problems.

There are some ways I believe we can attack this violence in the home.

First, we can restrict a batterer's access to guns. My office, along with Senators Jajuga and Barrett, filed legislation last year to get guns out of the hands of batterers. A version of the bill was recently signed into law by the Governor. It will prohibit the issuance of an FID card or a license to carry to anyone against whom there is an outstanding domestic violence order. The FID card or license to carry will also be suspended and all firearms ordered surrendered when such an order is issued.

Second, I want to enable our police officers to obtain a valid search warrant to search and seize the firearms of an abuser whose FID card or license has been suspended or revoked.

As I noted in a report on domestic violence my office released last year in partnership with the Harvard School of Public Health, I believe there are a number of ways we can address the crisis of domestic violence. Such ways include the creation of special domestic violence police units, special treatment for batterers, expanded domestic violence training for law enforcement and health care professionals, employer

assistance for victims and a change in the law for minors seeking medical treatment.

Stopping Youth Violence: The Demonstrated Successes of Violence Prevention

As our families and societal institutions fail to provide the support and structure our children need, more and more youngsters get caught up in the cycle of violence. Guns, gangs and violence are taking a devastating toll on the youth of this Commonwealth and throughout the country.

In a 1988 study, it was learned that homicide and suicide are the second and third leading causes of death for young people under the age of 21. In most of those cases, guns were involved.

In Boston, gang members represent a small percentage of youth, but police there estimate they are responsible for more than half of the city's murders. In other state urban centers, the fears and the statistics are similar.

Getting guns out of the hands of youngsters and gang members must be a priority. But early intervention and violence prevention in the life of a juvenile who may be beginning a pattern of crime is critical. Effective, coordinated responses and programs must be encouraged.

My office has a student violence mediation program, Student Conflict Resolution Experts (SCORE), aimed at preventing violence among young people before it happens. SCORE empowers young students to resolve their conflicts before they resort to the use of a gun or a knife, and these skills may be having an impact outside the school, touching their communities and families as well.

This program, now in place in 20 middle and high schools around the state, has a success rate of nearly 98 percent. I have asked the Governor and the Legislature to fund the SCORE program for every urban high school in the Commonwealth. I also challenged the members of the Massachusetts Municipal Association to start a student violence mediation program in their communities -- urban, suburban or rural -- before an episode of violence erupts in their schools.

We must also support and adequately fund the Department of Youth Services. I have also recommended funding for juvenile prosecution units in every District Attorney's office. As

Middlesex County District Attorney, we had a juvenile justice project which demonstrated that a focused approach to the prosecution of hard core juvenile offenders worked effectively.

In addition, we need to provide alternatives to incarceration for juveniles involved in nonviolent crime, including the creation of boot camps, work programs and more intensive probation programs.

Working with Urban Communities to Coordinate and Prevent Violence

Each year, my office has sponsored a statewide urban violence conference for community leaders, business leaders, local law enforcement officials and municipal officials from cities throughout the state. Hundreds of people have attended these conferences to hear about the violence prevention efforts being initiated throughout the Commonwealth.

The goal of the conferences is to allow local leaders to learn about model programs that are achieving success. I have followed up the statewide conferences with visits to individual cities across Massachusetts to work with representatives from those communities to discuss how prevention efforts can be effective for them. The response has been overwhelmingly positive as more and more communities are making efforts to prevent violence before it occurs and make the investment up front, rather than rely on law enforcement to "solve the problem at the end of the line."

Other Initiatives: Innovative Use of the Civil Rights Laws

My Civil Rights Division recently used the Massachusetts Civil Rights Act against a repeat domestic violence offender. We believe that this is the first time in the country that a Civil Rights statute has been used in that way. We obtained an injunction against the offender which will give additional protection to the women he has abused in the past, and will subject the defendant to additional penalties, if he abuses any women in the future.

My office also seeks to use the state civil rights laws against gang members who engage in a continued pattern of harassment against other groups or individuals, denying them the exercise of their right to travel safely on public streets and other public places, to go to school and to live in their homes free from harassment and intimidation.

Please contact Assistant Attorney General Stephen Limon at (617) 727-2200, if you are aware of any situations which may possibly be right for using the civil rights laws to prevent violence in either in a domestic violence or gang context.

Conclusion

Society has repeatedly turned to the law enforcement and criminal justice communities to "solve" the problems of violence and crime, when, in reality, it is a societal problem which everyone must work together to prevent. Violence and crime must be addressed as a question of values.

As I said earlier, there are no simple solutions or magic cures. As all of you who do an often thankless job each and every day know, neither rhetoric nor "30 second soundbites" are going to prevent the violence and the tragedies we see at the end of the line. However, many of you are leading the way to stop the violence and allow the public to once again feel safe in their homes, neighborhoods and schools.

In this issue of the Law Enforcement Newsletter, I have outlined some of the initiatives we have undertaken to prosecute violent crime and prevent it in the future. It is just a start, but I believe we and many others in law enforcement have demonstrated that some approaches and programs can be effective in combatting urban violence.

I look forward to hearing from you about your own ideas and initiatives, and I welcome your suggestions and comments on how we can better achieve our ultimate goal: To ensure public safety and protection for everyone. Together, I believe we can meet this challenge.

Sincerely,

Scott Harshbarger

THE INVESTIGATION AND PROSECUTION OF GENDER-RELATED HATE CRIMES

by: Judith E. Beals, Assistant Attorney General
Public Protection Bureau
Family and Community Crimes Bureau

In recent years, public attention has focused on the rising level of violence against women. Women are not only disproportionately victimized by violent crime; they are disproportionately maimed and killed by the most vicious and brutal forms of attack.[1]

This article addresses one type of crime against women, namely, crime motivated in whole or in part by bias against, or hatred of, women as a group. A "hate crime," as that term is used in this article, is a crime in which the perpetrator acts not simply out of animosity toward the individual victim, but out of hostility or prejudice toward the group to which the victim belongs. The Massachusetts Hate Crimes Reporting Act, G.L. c. 22, §32, defines a "hate crime" as:

> [A]ny criminal act coupled with overt actions motivated by bigotry and bias including, but not limited to, a threatened, attempted or completed overt act motivated at least in part, by racial, religious, ethnic, handicap, sexual orientation or gender prejudice...

A 1991 amendment to this statute specifically added "gender prejudice" to the list of forbidden motivations. St. 412, §22, 1991.[2]

Thus, both conceptually and legally, misogynous crimes are no different than acts of racial, ethnic, religious or homophobic violence, which, as discussed below, are frequently prosecuted under the provisions of G.L. c. 265, §37.

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[1] See e.g. Gender Bias Study of the Supreme Judicial Court, Commonwealth of Massachusetts (1989) pp. 79-109.

[2] Of course, crimes committed against men and motivated by hatred toward men are hate crimes as well.

BACKGROUND

Massachusetts civil rights statutes have long provided police and prosecutors a powerful set of tools for deterring and punishing crimes of bias and hate. The most frequently used of these statutes is G.L. c. 265, §37, entitled, "Violation of Constitutional Rights".[3] Together, these laws recognize the uniquely destructive individual and social impact of threats and violence committed out of bias, prejudice or bigotry. Appropriately, they single out those who commit these crimes for special societal censure in the form of heightened criminal sanctions and criminally enforceable court orders. In light of the United States Supreme Court's recent decision in Wisconsin v. Mitchell, 113 S. Ct. 2194 (1993), there can be no doubt about the constitutionality of these vitally important civil rights statutes.[4]

Over time, the Massachusetts civil rights laws have evolved both in their application and their utility. Although initially enacted and applied in response to racial conflict arising out of the desegregation of the Boston public schools, they quickly became a powerful tool for ensuring that all persons are free to live peacefully without threats or violence on account of their cultural, religious, ethnic or racial identity, or on the basis of their sexual orientation or disability. Southeast Asian Americans, Arab Americans, African Americans, Jews, gays and lesbians, Irish, Italian and Hispanic Americans, and disabled persons are among the many groups that receive the protection of

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[3] In addition to G.L. c. 265, §37, the following criminal statutes prohibit various forms of hate crimes: G.L. c. 265, §39, G.L. c. 266, 127A, and G.L. c. 272, §98. In addition, G.L. c. 12, §H-J empowers the Attorney General to obtain criminally enforceable court orders for the protection of victims of bias-related threats, intimidation, and coercion, as well as other civil rights violations. G.L. c. 12, §11I permits private litigants to seek monetary damages and injunctive relief for such violations.

[4] In Wisconsin v. Mitchell the Supreme Court upheld a Wisconsin statute that increases a defendant's sentence where the defendant selects his victim because of her race or other protected status. It held that enhanced penalties for bias-motivated crimes do not violate the First Amendment, and are justified by the special societal harms caused by hate crimes. 113 S. Ct. at 2199-2202.

the Massachusetts civil rights laws. However, these statutes have seldom, if ever, been used to prosecute crimes motivated by bias against a victim's gender. As discussed below, these crimes are clearly covered by G.L. c. 265, §37, and should be investigated and prosecuted as such.

LEGAL BASIS FOR INVESTIGATING AND PROSECUTING GENDER-BIAS HATE CRIMES UNDER G.L. C. 265, §37

G.L. C. 265, §37 provides that:

> No person, whether or not acting under color of law, shall by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him by the constitution or laws of the Commonwealth or by the constitution or laws of the United States.

Prosecution under this statute requires proof that: (1) the defendant used force or threat of force; (2) the victim was exercising or enjoying a right or privilege secured by the constitution or laws of the Commonwealth or the United States; (3) the defendant either injured, intimidated, interfered with, oppressed or threatened the victim, or attempted to injure, intimidate, or interfere with, or oppress or threaten the victim's exercise or enjoyment of a secured right; and (4) the defendant acted willfully.

The requirements for proving each of these elements in the context of racial crimes have been dealt with elsewhere.[5] This article is, therefore, limited to highlighting specific issues involved in the prosecution of hate crimes based on gender.

At the outset, it should be clear that just as most crimes committed by white persons against black persons, or vice versa, are not racially motivated, most acts of violence perpetrated by men against women, or vice versa, are not "hate crimes". The following principles, derived from settled practice in prosecuting other kinds of hate crime, should guide the

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[5] See e.g. Model Jury Instructions of the District Court Department. See also Sager, Rights Protected by the Massachusetts Civil Rights Act Against Interference on Account of Color, 17 Suffolk U.L. Rev. 53 (1983).

determination of whether a particular incident is a "hate crime" involving gender bias.

1. The victim must be exercising rights secured by the laws or constitution of the Commonwealth or the United States

Given the breadth of the civil rights protected by Massachusetts and federal law, this element of the crime should not present particularly vexing questions of interpretation or application in the context of gender-related hate crimes.

Under the 1976 Equal Rights Amendment to the Massachusetts Constitution, the right to equality under the law on the basis of gender is specifically protected. Mass. Const. Pt. 1, Art. 1 as amended by Art. 106 of the amendments. Under the applicable Massachusetts civil rights laws, including G.L. c. 265, §37, this constitutional guarantee prohibits private gender-based distinctions that are accomplished by proscribed forms of conduct. See, e.g., O'Connell v. Chasdi, 400 Mass. 686, 694 (1987). Thus, any gender-motivated threat, violence, or intimidation clearly implicates this constitutionally secured right.

In addition, state and federal laws secure rights of gender-neutral treatment to all persons in: (1) the use of public streets, sidewalks and other places of public accommodation, G.L. c. 272, §§92A, 98; (2) the use and occupancy of housing accommodations, G.L. c. 151B, §4(6); G.L. c. 93 §102; 42 U.S.C., §3604; 42 U.S.C., §1982; (3) the performance of employment related duties, G.L. c. 93, §102; G.L. c. 151B, §4; 42 U.S.C., §1981; and (4) the right to be safe and secure in one's person and in the use of personal property, Mass. Const. Art. 1.

2. The defendant must have acted willfully to injure, intimidate, interfere with, oppress or threaten the victim in the exercise of her rights.

In order to establish this element, it is not necessary to show that a victim was aware that she had or was exercising a protected right or privilege, or that the defendant actually knew that he was depriving a person of a specific right or privilege. Commonwealth v. Stephens, 25 Mass. App. Ct. 117, 124-125 (1987). It is only necessary to show that the defendant acted intentionally in activity that has the effect of interfering with a protected right. Id.

3. The defendant must have acted out of bias based on gender.

This means that, because of his bias against women, the defendant formed and acted upon a specific intent to commit an act which has the effect of depriving a woman of at least one of her civil rights. See Commonwealth v. Stephens, 25 Mass. App. Ct. 117, 123, 125 (1987). A crime against a woman is not a crime of hate merely because the victim happens to be a woman; her gender must have been a motivating cause of the crime.

Thus, as with other hate crimes, there must be some evidence of the perpetrator's bias motive, such as language or gestures expressing hostility to women in general. Even if the defendant in fact acted out of hatred toward women, unless he showed some sign that this was his motivation, or unless the conclusion that he was motivated by hatred is a fair inference from the specific facts of the case, he cannot be prosecuted for a hate crime.

Perhaps the easiest examples of misogynist hate crimes are those in which there is direct, explicit evidence of the defendant's bias motivation. The 1989 massacre at the University of Montreal of fourteen female students, in which the killer first separated female from male students and cursed the women as "a bunch of feminists", is the most savage and notorious recent example of such a crime. Locally, a case involving a woman who was repeatedly raped and stabbed by a group of men who indicated that they set out to "get a woman" provides another example of a possible hate crime.

However, evidence of bias motive is not limited to direct statements. The determination of whether a particular incident is a hate crime must depend on a careful evaluation of the evidence to determine the motives of the perpetrator. The "Bias Indicators" included in the regulations promulgated pursuant to the Hate Crimes Reporting Act, G.L. c. 22, §17, are particularly helpful in this regard. See 501 C.M.R. 4.00 et. seq.[6] They include the following considerations. (Specific examples offered here are applications of the general principles set forth in the current regulations):

- bias-related oral comments, written statements or

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[6] These regulations were amended in 1993 to reflect the addition of gender bias as one of the forbidden motivations for hate crime.

gestures made by the offender in the course of committing a crime. In addition to the Montreal example cited above, these might include epithets such as "bitch", "dike", "cunt" or other pejorative references based on gender;

- bias-related drawings, markings, symbols, or graffiti left at the crime scene;

- a track record of violence against women. While every rape and every act of domestic violence is not necessarily a hate crime, a hate crime prosecution may be appropriate where the perpetrator has demonstrated a pattern of dominating women through assaults and violence. For example, evidence of multiple restraining orders sought by a series of women against the same man may constitute compelling evidence of the perpetrator's hatred of women;

- a context in which the victim is overwhelmingly outnumbered by men in a setting where women are perceived as violating sex role conventions. For example, where the only female member of a work crew is repeatedly threatened at her place of work, or her locker is repeatedly vandalized;

- the victim is involved in activities promoting feminism or women's issues. For example, where vandalism and threats are directed toward the editors of a feminist newspaper, or a battered women's advocacy group;

- where the perpetrator has selected only female victims (e.g., wife, daughters, sisters) but not male victims; or where the perpetrator has a history of previous crimes with a similar modus operandi, and there have been multiple victims of the same gender;

- the location of the wounds at or near the victim's sexual parts.

Again, it is important to remember that any one of these factors, standing alone, may or may not support a determination of bias motive. In some instances, one bias indicator may be sufficient to support the conclusion that a crime was motivated by bias or bigotry (e.g. bias-related epithets or markings). In other cases, more than one indicator may be necessary to support such a conclusion. As the current Hate Crimes Reporting Act

regulations remind us, "[c]ommon sense judgment should . . . be applied in making the determination whether a crime should be classified as a hate crime". 501 C.M.R. 4.04(1).

4. Hatred of women must be one motivation for the crime, but it need not be the only motivation.

A man who assaults a woman solely because, for example, the woman insulted him, has not violated G.L. c. 265, §37. If, however, hatred of women was one of the motivating factors in his assault, and this can be proven, this does violate the statute. "[T]he deprivation of civil rights contemplated by G.L. c. 265, §37, does not have to be the predominant purpose of the defendant's acts." Commonwealth v. Stephens, 25 Mass. App. Ct. at 124. It is sufficient that the perpetrator was acting out of hatred or bias, together with other motives; or that bias was a contributing factor, in whole or in part, in the commission of a criminal act.

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No doubt other issues will arise in specific prosecutions. When this happens, it is important to remember that our experience in investigating and prosecuting other kinds of hate crimes can be used in responding to crimes motivated by gender.

The Civil Rights Division of the Attorney General's Office is available to provide technical assistance to police departments and District Attorneys considering prosecuting gender-related hate crimes as well as any other bias-related crimes. Please call (617) 727-2200.

LAW ENFORCEMENT HATE CRIMES TASK FORCE

Attorney General Scott Harshbarger recently formed a Law Enforcement Hate Crimes Task Force. The new task force, which was announced in conjunction with the report by the Anti-Defamation League of an increase in anti-semitic incidents in Massachusetts, arose out of a meeting of representatives from area law enforcement agencies known to be dealing with increased activities of organized hate groups. The purpose of the original meeting was to share available information regarding the nature and extent of such activities and to discuss arrangements for a coordinated response by law enforcement.

It was agreed, as a result of that initial meeting, that a cooperative effort by law enforcement was essential to effectively address this growing concern; and particularly, that access to available intelligence on organized hate groups would be of tremendous assistance to each individual agency. Accordingly, a central repository for such intelligence has been created within the Civil Right Division of the Attorney General's Office. The Division will assume responsibility for distributing this collected information to the law enforcement community largely through the creation of a hate crimes intelligence index.

Through the continued cooperative efforts of federal, state, and local law enforcement, the hope and expectation of this task force, the membership of which will be expanded to include any law enforcement and prosecution agency that deals with this issue, is that participants in organized hate groups can be identified and the criminal activities which they initiate and encourage successfully prosecuted.

The task force is scheduled to meet for the third time in late July, 1994. In the interim, the Civil Rights Division continues to assist prosecutors and investigators through the collection and dissemination of law enforcement intelligence on hate group activities. Toward that end, the Division welcomes receipt of information, intelligence or materials which may have been gathered pursuant to investigations and/or prosecutions of such activities. In order to be most beneficial, such materials should include, wherever possible, copies of photographic and documentary evidence obtained in such cases.

As always, the Civil Rights Division continues to be prepared to supplement criminal prosecutions of such crimes

through utilization of the civil injunction. Inquiries regarding appropriate situations that are confronted by prosecutors and police can be directed to Assistant Attorneys General Richard Cole or Joe Whalen in Boston.

FACT SHEET ON G.L. c. 258C, COMPENSATION OF VICTIMS OF VIOLENT CRIME

On April 14, 1994, a new victim compensation law went into effect. The new law, G.L. c. 258C, significantly reforms the process by which victims of violent crime receive financial compensation for out-of-pocket expenses. Under the old law (G.L. C. 258A), victims were required to go through a long and often adversarial court process to obtain compensation. Under the new law, claims are filed, investigated and approved for payment by the Division of Victim Compensation and Assistance in the Attorney General's office.

All claims for compensation filed before April 14, 1994, will continue to be adjudicated under the court-based process of G.L. c. 258A. Claims filed on or after April 14, 1994, will be determined in accordance with G.L. c. 258C.

This fact sheet provides a general summary of G.L. c. 258C.

PURPOSE: To provide financial compensation for out-of-pocket expenses to victims of violent crime.

PERSONS ELIGIBLE FOR COMPENSATION:

- Victims of violent crime who suffer physical or psychological injury as a result of a violent crime.
- Dependents and family members of homicide victims.

COMPENSABLE EXPENSES:

- Burial expenses ($4,000 limit).
- Crime-related medical expenses.
- Crime-related mental health counseling expenses.
- Lost wages.
- Homemaker services (must have been sole occupation of victim for one year preceding crime).
- Loss of support (dependents in homicide cases only).

NON-COMPENSABLE LOSSES:

- Losses covered by health insurance, disability insurance, Medicaid, Medicare, "free care", workers compensation, unemployment compensation, social security benefits, other public benefits, retirement benefits, restitution, civil suits, or gifts.

- Personal property (money, jewelry, etc.)

- Pain and suffering

- Lost wages due to court appearances.

ELIGIBILITY REQUIREMENTS

- Victim must suffer physical or psychological injury or death as a result of a crime.

- Crime must be reported to police or other law enforcement authorities within five days after crime occurred, unless claimant demonstrates good cause for delay.

- Claimant must cooperate with law enforcement authorities in investigation and prosecution of the crime unless claimant demonstrates reasonable excuse for failing to cooperate.

- Claimant must suffer out-of-pocket losses of at least one hundred dollars or two continuous weeks of lost earnings or support. (Does not apply to claimants over the age of sixty, or to victims of rape.)

- Claim must be filed within three years of date of crime.

LIMITATIONS:

- Claim may be denied if compensation would unjustly benefit the offender.

- Claim may be denied or reduced if the victim provoked or contributed to the injuries.

- Maximum award to all claimants for one crime is $25,000.

- If claimant is represented by an attorney for purposes of victim compensation claim under the statute, the attorney may receive up to 15% of any compensation awarded, as determined by the Division. Attorney's fees are deducted from the total award to the claimant. Note: this program is designed to assist claimants without the need to hire an attorney.

STEPS IN FILING A CLAIM

1. Obtain an application form from local District Attorney's office or from:

   Massachusetts Attorney General's Office
   Division of Victim Compensation and Assistance
   One Ashburton Place
   Boston, MA 02108
   (617) 727-2200

2. Complete the application form and return it to the Division. In order to process, application form must be fully completed, and accompanied by supporting verifications, bills, and a release of information. Failure to provide necessary verifications will result in denial of all or part of claim.

3. Claimant must cooperate in investigation of claim. Failure to cooperate may result in denial of claim.

STEPS IN PROCESSING CLAIM

1. Upon receipt of completed application, Division will acknowledge receipt of claim.

2. Division will conduct investigation of claim to verify information contained in the application.

3. Upon completion of investigation, Division will notify claimant of the amount of compensation to be paid or denied.

If claimant assents, Division will request immediate payment by Treasurer's office.

4. Claimant may request reconsideration of administrative decision (to be filed within fifteen days of administrative decision). Claimant may also seek judicial review of administrative decision in the district court (to be filed within thirty days of administrative decision, or with twenty days of decision on request for reconsideration).

For further information, contact the Division of Victim Compensation and Assistance at (617) 727-2200. Ask to speak to a victim advocate.

HOW TO HANDLE ALZHEIMER'S PATIENTS IN THE COMMUNITY: A PROTOCOL FOR POLICE OFFICERS

by: Gerald Flaherty, Director of Special Projects, Alzheimer's Association of Eastern Massachusetts, and

John S. Scheft, Director, Elderly Protection Project, Office of the Attorney General

I. WHAT IS ALZHEIMER'S DISEASE?

First described by Dr. Alois Alzheimer in 1906, Alzheimer's disease is characterized by a condition known as "dementia," which refers to a collection of symptoms (loss of short term memory, thinking and judgment). Alzheimer's is a "degenerative" (it gets worse over time) disease of the brain that impairs the person's ability to remember, to think, to make sound judgments and eventually to care for him or herself. It is a terminal illness that can last anywhere from 3 to 20 years. It affects over 100,000 Massachusetts residents and more than 4 million individuals nationwide. It is the fourth leading cause of death for adults.

Alzheimer's is not a normal part of aging nor is it a psychiatric disorder. It is not a mental illness. There is not a single test for Alzheimer's. The best diagnostic method is for a team of diagnosticians to eliminate all the other possible causes of memory impairment (e.g., a head injury, brain tumor).

II. NATURE OF THE PROBLEM

A. Anticipated Police Involvement

Alzheimer's is a disease of the elderly. The prevalence among those over age 65 is estimated by the Massachusetts Alzheimer's Association to be 10% and, in the over 85 age group (the fastest growing segment of the population in America), it is a staggering 47%.

Furthermore, of the estimated 100,000 Massachusetts residents with Alzheimer's, about 75% are cared for at home by their families -- and less than 5% of these families have support services such as day care or home health services. The typical caregiver at home is a woman who is 71 years old with at least two chronic health problems of her own to cope with in addition

to caring full time for her Alzheimer's patient. Understanding this state of affairs can help officers comprehend why patients end up wandering from their homes -- it is often because their caregivers are totally exhausted and physically unable to keep giving care. Indeed, caring for an Alzheimer's patient has been called "the 36 hour day". With this in mind, there is a significant chance that officers will become involved at some point in instances of abuse and neglect or other situations concerning this group. Perhaps more importantly, officers will come in contact with Alzheimer's patients who are out in the community, oftentimes disoriented and wandering.

B. Recognition

There are no filed tests to determine if someone has Alzheimer's, so the officer has to look for clues.

1. Identification

The most immediate and clear way to know if someone has Alzheimer's is to look for an ID bracelet with words such as "memory impaired" on it, or for a wallet card with the same message.

Families should be advised to register patients in *Safe Return*, the National Alzheimer's wanderers alert program. For a one-time $25.00 fee, the patient's key information is placed in a central registry. The patient receives a bracelet with the person's name, the words "memory impaired", and the toll-free number 1-800-733-9596 on the back. The Registry operates around the clock, 365 days a year. When a patient wanders away from a home or institution and the "800" number is called, a FAX alert goes out immediately, after verification, to local agencies such as the police and hospitals. A local representative from the Alzheimer's Association, on call around the clock, then begins working with the missing patient's caregiver and with the police and others to ensure that a thorough search is done and, afterwards, to try to remedy the situation that caused the elder to wander in the first place.

Still, keep in mind that less than 10% of people diagnosed with Alzheimer's wear an ID bracelet. If there is no explicit identification, check for other forms, such as a hospital bracelet, driver's license, wallet cards, etc. If the patient has no paper ID, then check for identification labels on their inner and outer clothing.

2. **Clues**

Other than paper identification, pay attention to how the individual looks, interacts, and behaves. As a first responder, keep in mind that individuals with Alzheimer's can be sick or injured but may be unable to communicate this information effectively. Keep your interview and assessment simple and remain calm, as Alzheimer's patients take their action cues from your words and behavior. Consider the following clues in deciding whether you may be dealing with an Alzheimer's patient:

a. Physical Clues

Inappropriately dressed for weather; vision problems; blank facial expressions (do not assume the person is intoxicated).

b. Physical Clues

Short term memory loss; repeats same questions; confused as to time and location; disoriented about their own and others identities; unable to communicate. A person may also be delusional, or even combative if very frightened.

c. Situational Clues

An elderly person discovered in one of the following situations may be suffering from Alzheimer's:

(1) ***Wandering:*** All patients are at risk for wandering and, thus, becoming missing persons. Wandering is caused by restlessness due to boredom, confusion about time or altered physical environment, fear caused by delusion or hallucination. It is estimated that 60 to 70% of Alzheimer's patients will wander from their residences at some point during their illness. Wandering is life threatening because the patient could die within 24 hours or be injured due to an unattended health condition or vulnerable mental capacity.

(2) ***Driving:*** Because they may still be driving yet unaware of the severity of their disease, people with Alzheimer's can easily become lost or even leave the scene of an accident

after literally forgetting what happened.

(3) ***Shoplifting:*** Sometimes Alzheimer's patients simply forget that they have picked something up, that it is necessary to pay for the item, or even that they are in a store. Not all elderly shoplifters have Alzheimer's, but police should consider it a possibility, particularly if the elder appears disoriented.

(4) ***False Reports:*** The Alzheimer's patient may report an "intruder in the house" who turns out to be a wife or a husband. Patients may also report thefts that did not occur, especially given that those with Alzheimer's may experience heightened suspicions.

(5) ***Indecent Exposure:*** Patients often fidget with zippers and buttons, which can be misinterpreted. Many have also lost impulse control, so if it feels too hot, they may just take their clothes off. If they feel the need to go to the bathroom, they may just do it without realizing that they are not necessarily in the bathroom.

(6) ***Victimization:*** Alzheimer's patients are easy prey for con artists and muggers. Alzheimer's victims may come to your attention when you get involved in legal actions like evictions and repossessions because thy have forgotten or just are not able to pay bills.

C. **Interacting With The Potential Alzheimer's Patient.**

In virtually any interaction, the object is to return the patient safely to his caregiver.

1. ***Catastrophic Reaction***

To facilitate a safe return, you must ease the situation and avoid prompting the Alzheimer's patient into a "catastrophic reaction". What most people would consider mildly stressful, like being stopped and questioned by a police officer, can get way out of proportion for an Alzheimer's patient. The patient

may break down and cry uncontrollably, try to run, or get extremely angry.

2. ***Avoid Restraints If Possible***

Understandably, the use of handcuffs and other restraints are likely to cause a catastrophic reaction. You should take advantage of any leeway you may offer the patient by avoiding handcuffs. Bear in mind, however, that the Alzheimer's patient who is frightened and upset may threaten the safety of himself and others. In this situation, restraint may be the best alternative for maintaining order. When restraining an elder, practice techniques for preventing injury.

3. ***Keep The "Climate" Cool***

If you keep your voice "cool", you may help the impaired person -- and others involved -- to do the same. This is why it is also important to use non-threatening hand gestures. It is important to be firm, but nonaggressive and reassuring. This posture will help you draw the most helpful response from an Alzheimer's patient.

4. ***Behavior Management***

The Alzheimer's victim will tend to mimic your body language and the tone of your voice. For example, if the patient sits down in the middle of the sidewalk and will not get in your cruiser, sit down next to him. When you get up, he will get up. If you get in the car, he will get in the car. As another example, if the patient refuses to get out of the cruiser because he says that it is raining when, in fact, it is sunny, then tell him you have an umbrella for him. The disease prevents his brain from processing our reality, so humor the patient. It works and there is nothing wrong with that approach.

5. ***Make Communication Simple***

If possible, you should speak to the patient one-on-one, away from crowds and noise. Overloading the patient with too much information in the middle of too much commotion may lead to a catastrophic reaction. Keep the following considerations in mind:

a. <u>Introduction</u>

Tell the person who you are and why you are there. You may have to explain several times because the patient

often will not remember, from moment to moment, what you think should be obvious.

b. Speak slowly and calmly.

Look directly into the person's eyes.

c. Ask only one question or give only one direction at a time.

Try to ask simple questions. Do not ask questions which require a lot of thought and memory. (Remember that the person's answers may not reflect what he really means to say.)

d. Keep your instructions positive.

For example, say, "Please sit quietly in the car", not, "Don't try to get out of the car".

e. Avoid instructions that require the subject to do more than one thing at a time.

f. If the person does not respond to what you say, wait a few moments and then repeat exactly what you said earlier.

The person may not remember what certain words mean so it helps to reinforce your earlier statement.

g. Do not assume that the person is hearing-impaired.

Shouting will probably not help someone with Alzheimer's understand the meaning of your words.

III. THE MISSING ELDER: POLICE AND THE ALZHEIMER'S NETWORK

A. Essential Orientation

At the risk of being repetitive, it cannot be emphasized enough that a missing, wandering Alzheimer's patient is an emergency situation. Police cannot insist on a waiting period before taking action. Such a delay might be appropriate in the case of a missing young adult who has the ability to function in the community, but Alzheimer's patients can have a catastrophic reaction at any time when lost, especially as darkness approaches or as a physical impairment becomes more pronounced.

If nothing else, take these cases seriously.

B. Notification: Three Ways That Police Learn About Wanderers

You will encounter or learn about Alzheimer's wanderers in three different ways.

1. The Street Encounter

As discussed previously, sometimes you will encounter an Alzheimer's patient during routine patrol or while answering a call that you thought involved a different kind of issue -- for example, an elder being detained by a store owner for shoplifting when, in fact, you discover that the elder is likely suffering from Alzheimer's. In these instances you try to identify the elder and return the person safely to their caregiver. Keep in mind that any unattended person with Alzheimer's is a potential wanderer and likely to be lost and disoriented.

It is also advisable in these circumstances to alert the Alzheimer's Association so that their staff can assess the situation that resulted in the patient's wandering and attempt to develop a more permanent response to any gaps in caregiving or supervision of the patient.

2. Caregiver Notifies The Police

a. <u>Collect Information</u>

When you receive a call from a caregiver about a missing Alzheimer's patient, be sure to obtain the following information from the caregiver:

(1) Caller's name, number and address.

(2) If patient registered with Alzheimer's program (if so, obtain I.D. number).

(3) Length of time missing.

(4) Where last seen.

(5) Whether or not search of immediate area conducted (if not, request caller to do so).

(6) Physical appearance.

(7) Medical condition.

(8) Whether on foot or driving.

(9) Communication skills of patient.

(10) If patient appeared to be agitated before disappearance.

b. Call Safe Return Operator

Then you should contact the operator at the *Safe Return* program at the toll-free number, 1-800-733-9596, to communicate the appropriate information that you previously collected.

c. Anticipate the Distribution of Key Information

The *Safe Return* program has a large fax communication network, which the operator can access immediately. Fax notices containing pertinent information will be sent to surrounding police departments; the State Police; MBTA Police and Amtrak Police (an important notification since some elders end up attempting to access public transportation); emergency services agencies, ambulance companies and hospital emergency rooms; the Medical Examiner's Office; local shelters; and, in a recent system improvement, NCIC.

d. Cooperate with the Local Chapter of the Alzheimer's Association

The national operator will notify the local chapter to assist the police in coordinating their efforts to find the patient. You may also choose to call the local chapter in your area to seek their assistance and expertise.

3. **Caregiver Notifies The National Alzheimer's Association**

When this is the situation, the procedure is similar to that outlined above. The *Safe Return* program, having received a call from the caregiver, will obtain the requisite information from the caller and then:

a. Notify the Local Alzheimer's Association Chapter

b. Have the Local Chapter Verify Information

The on-call staff member at the local chapter will call the reporting caregiver, typically a family member or nursing home official, to verify that the patient is still lost and to discuss the circumstances.

c. Local Chapter Contacts Police

The local Alzheimer's staff member will call the police and discuss an appropriate response to the situation.

d. Fax Network May Be Activated

Depending on the results of the verification process, the fax network at the national program may or may not be activated.

B. Operations: The Police Search and Related Responsibilities

The police have two major responsibilities when confronted with a missing Alzheimer's patient. They must handle communications and conduct an appropriate search.

1. Communications

Certain kinds of communication ar critical. Thus, the police must:

a. Place The Report on the NCIC

While it is true that the national association has this capability, you should not assume that it will be done. Consequently, be sure to check NCIC to see if the information has been logged appropriately. If not, make sure that it is done.

b. Issue the Radio Report To Surrounding Communities

You should ensure that a radio report is issued to the surrounding community police agencies. Do not assume that a fax transmittal is a substitute for radio contact. The fact is that most police

patrol officers use the radio as their immediate source of information. Especially in cases of lost Alzheimer's patients, time is of the essence.

c. Ask Neighboring Police Departments to Include A Report In All Their Shift Briefings

d. Notify Change of Shifts at Your Own Department

Take responsibility for ensuring that future shifts are notified about the missing Alzheimer's patient. Without this step, continuity in the search process can be severed when people on future shifts fail to be informed.

e. Inform Media Outlets

Media outlets should be notified eight hours from the time of the patient's disappearance. The media should be notified immediately if the missing person has a life threatening health problem or if the weather is extremely cold or hot, or darkness has begun to fall.

f. Notify Local Postal Officials

Postal officials can alert mail carriers, who provide an excellent network of eyes and ears in the community where the patient may still be wandering.

2. **The Search**

Officers should search the immediate and surrounding area first. Most Alzheimer's patients are located within a fairly short distance from the place they left. Be sure to check the familiar places of the patient, such as the patient's past place of employment, favorite restaurant, and so forth.

C. **Conclusion**

There is another benefit to utilizing the national network. Once an Alzheimer's patient is located, the national operator can fax all of the previously notified agencies and outlets to inform them that the search is over. This saves countless hours of wasted effort and phone calls.

IV. BOSTON POLICE PROCEDURES: A MODEL RESPONSE

The Boston Police in cooperation with the Boston Commission on Affairs of the Elderly and the local Alzheimer's association have instituted a thorough procedure to deal with all varieties of missing persons, especially elderly residents and Alzheimer's patients. See the *Boston Police Rules and Procedures Manual*, Rule 317: "Missing Children and Persons" (amended rule as of December 30, 1992). Their procedures apply to a resident who is (1) suspected of suffering from Alzheimer's disease, or (2) of poor mental health, or (3) sixty years of age or older.

1. Notification

When a missing person report is received, the responding officer must immediately notify the Boston Commission on Affairs of the Elderly through the Mayor's Hotline: 635-4500. [Although not formally mentioned in the rule, the officer can access, and several commanders have, the *Safe Return* program in the manner discussed above.]

2. Reporting And Searching

In all cases, a complete intake must be done and appropriate reports filed to activate a Departmental response and the NCIC network. The appropriate Area Commander, in conjunction with officers and the Senior Service Officer (there is at least one S.S.O. officer assigned to each Area command that serves in this capacity), will coordinate a search for the missing individual.

3. Follow Up

Perhaps most impressive about the Boston model, is its emphasis on effective follow up with the person who reported the missing person. Thus, the Area Commander must ensure: At least once each day for 5 days after a report is received, an officer contacts or visits the home of the informant (that is, the person who made the initial report) to ascertain whether the elder or patient has been returned. After the initial 5 day period, that an officer visits the informant at least once a week until the elder or patient has been located. The officer's name and date and time of each contact must be recorded on the missing person report.

V. CONCLUSION

Increasingly you and other officers are dealing with Alzheimer's patients in the community. Effective intervention is a challenge for the individual officer and for the department.

The officer must demonstrate compassion and judgment when interacting with persons who, through no fault of their own, may be extremely difficult to reach and work with. In the midst of that frustration, remember to keep calm and to keep your perspective and humor. Beyond their obvious limitations, Alzheimer's patients are members of our society to be valued and protected. The neurologist A.R. Luria probably said it best: "People do not consist of memory alone. They have feeling, will, sensibility, moral being. It is here that you may touch them, and see a profound change."

Departments are beginning to understand that, like other issues involving the elderly, a coordinated response is necessary. Police are encouraged to use the network and support of the national Alzheimer's organization and its local chapters. They have the expertise to help find the missing person and to help alleviate the caregiver conditions that prompted the disappearance in the first place.

KEY CONTACTS

There are currently three local Massachusetts chapters of the National Alzheimer's Association. The largest chapter is in Eastern Massachusetts.

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SOURCE MATERIALS

Much of this material is adapted from *Victim, Not Criminal: The Alzheimer Sufferer,* which is published by the National Alzheimer Association, Inc. The quote from Dr. Luria is cited in materials used by the *Alzheimer's Association of Eastern Massachusetts* and originally appeared in a letter that Dr. Oliver Sacks mentioned in his book entitled *The Man Who Mistook His Wife For a Hat and Other Clinical Tails.*

RECENT CASES

I. SEARCH AND SEIZURE

A. Searches Pursuant to Warrant

High degree of detail in affidavit does not serve as proof of informant's veracity. Commonwealth v. Oliveira, 35 Mass. App. Ct. 645 (1993). The only statement in the affidavit in support of a search warrant specifically relating to the confidential informant's reliability was that it had provided information in the past leading to the arrest of a named individual for controlled substance violations. The affidavit also contained information from the informant concerning the defendant's activities. The defendant told the informant that he was getting two kilos of cocaine and intended to keep it at the address searched until he could get it to the customers he had lined up. The defendant told the informant how the cocaine was to be cut and distributed, the name of his buyers, and exactly where in the house it was being kept. The defendant also specifically described to the informant how the cocaine was to arrive from Florida. Finally, the informant indicated that he saw the cocaine at the defendant's home, and also saw individuals carrying guns and using one of the bedrooms as a "watchtower."

The Appeals Court reversed the conviction, holding that the information in the affidavit did not satisfy the "veracity" prong of the Aguilar-Spinelli test. The trial judge had held that the veracity test was met by the high degree of detail in the information provided by the informant. The Appeals Court rejected this reasoning stating that such specificity goes to establishing the informant's basis of knowledge, and not its reliability. The court noted that the affidavit contained none of the information that typically serves as indicators of reliability, such as information that the informant had aided in securing criminal convictions for similar offenses in the past, independent police corroboration of details provided by the informant, and statements by the informant which puts him or her in actual risk of prosecution. The court further indicated that even if detail in the informant's information could make up for a lack of information about reliability, the specificity in the present case was insufficient to establish reliability of the informant.

Description of defendant's home in search warrant as single family was proper despite multi-unit quality. Commonwealth v. LaPlante, 416 Mass. 433 (1993). In this first degree murder

case, the Supreme Judicial Court upheld the trial judge's ruling that the defendant's home was correctly described in a search warrant as a single family, and not a multi-unit dwelling, despite its multi-unit quality. Prior to obtaining the search warrant, police: (1) viewed the exterior of the defendant's home, which from all outward indications appeared to be a single family residence; (2) consulted with the town clerk, who informed them that one family lived at that location; and (3) observed the defendant's brother go from one part of the house to the other through unlocked interior doorways. The Court concluded that under the circumstances the police conducted a reasonable investigation to ascertain the status of the premises prior to obtaining a warrant to search.

Police must possess copy of warrant when executing it unless there are exigent circumstances. Commonwealth v. Guaba, 417 Mass. 746 (1994). After obtaining information from a confidential informant that the defendant was involved in drug distribution, and after seizing a package of cocaine from the defendant and placing him under arrest, a police detective went to court to obtain a search warrant to search the defendant's apartment. Anticipating that a search warrant would be issued, other officers went to the apartment to secure the premises. They waited until they received a call from the detective indicating that the search warrant had been issued before searching the apartment. Before the search was completed, the detective arrived with the warrant. The defendant claimed that the search was warrantless because the search warrant was not at the premises when the search began, and the search did not meet any exceptions to the warrant requirement.

The Supreme Judicial Court concluded that art. 14 of the Massachusetts Declaration of Rights implicitly requires law enforcement officials to possess a copy of the warrant when executing it, unless there are exigent circumstances which would permit a warrantless search. The Court noted that the presence of the warrant guides law enforcement officers as to the permissible scope of the search, and serves to put the occupants on notice of the police's authority to search and the reasons for the search.

Failure to announce purpose when executing warrant not improper under circumstances. Commonwealth v. Antwine, 417 Mass. 637 (1994). Shortly before midnight, police officers executed a warrant at the defendant's apartment. One officer knocked on the door of the apartment several times and identified himself as "police". He did not announce the officers' purpose for being there. The officers knew that there were three warrants

outstanding for the defendant's arrest and that the defendant was in the apartment. They heard no noise in the apartment. Approximately twenty seconds after the first knock, the police forced their way into the apartment. The defendant claimed that the forcible entry by the police without an announcement of their purpose violated the knock and announce rule.

The Supreme Judicial Court noted that the purposes of the knock and announce rule are to decrease the potential for violence, protect privacy, and prevent unnecessary damage to homes. The court has recognized exceptions to the rule, such as where police have reason to fear for their safety, where they are reasonably acting to prevent destruction of evidence, and where the person inside has knowledge of the officers' purpose and presence. The Court noted that it would have been a clearer case if there had been evidence that the knocks and identification were loud, and if there had been a greater interval between the knocks and the entry. However, the court stated that if the defendant did not hear the knocks and identification, the officers were entitled reasonably to conclude he would not have heard any announcement of purpose, and if he did hear the knocks and identification, he could have guessed what the police's purpose was. Therefore, under the circumstances, the police could have been virtually certain that the defendant already knew why the police were present, and the failure to announce the purpose was not improper.

B. Warrantless Searches and Seizures

Warrantless seizure of bag removed by defendant from his car after a traffic arrest was valid. Commonwealth v. George, 35 Mass. App. Ct. 551 (1993). The defendant, who was stopped for speeding by a police officer, could not produce a license, claiming that it was not on his person or in the vehicle. The defendant gave the officer a nine-digit license number which resulted in a "no response" message. The defendant then claimed that the number was for a New York license, and that New York used Social Security numbers to identify its drivers, although the officer knew this was not true. After being joined by his partner, the officer told the defendant he was under arrest for driving without a license. Both the defendant and his passenger got out of the car and stood a few feet away from the officer. The defendant claimed that he lived right across the street, and asked if he could go get his license. The officer knew that the address given by the defendant was ten blocks away. The defendant then asked if his passenger could get his license, and the officer said the passenger could do whatever he pleased. Suddenly, the defendant reached into the car and got a zippered

gym bag which he passed to his passenger. Just as the passenger began to unzip the bag, the officer grabbed it, because if there were a weapon in it, the passenger could have easily reached it. The bag felt heavy, and the officer unzipped it and found a large quantity of crack cocaine, drug paraphernalia, and ammunition. The defendant claimed that the contents of the bag should have been suppressed because it was a warrantless search, not justified as a protective search for weapons, and was not within his immediate control at the time of the search.

The Appeals Court upheld the search as a valid search for weapons incident to an arrest. The court noted that, given the plenary power of police to arrest for traffic offenses, the court must be on guard for pretext searches not based on a genuine and reasonable concern about a concealed weapon or destruction of evidence. Although operating without a license is not an offense which ordinarily generates reason to believe weapons are present, in this case, the defendant's evasive replies and sudden, unexpected movement of the bag created an objectively reasonable concern on the part of the police that the bag might contain a weapon. The fact that the bag was actually in the possession of the passenger did not affect the validity of the search because the bag was within both the defendant's and passenger's reach, and they had access to the bag's contents because the passenger had begun to open it.

Seizure of gun discarded by defendant during chase was valid. Commonwealth v. Harkess, 35 Mass. App. Ct. 626 (1993). Two police officers saw the defendant in a high crime area at 3:00 a.m. The defendant was known to the police as being involved in the sale of drugs and guns. When the defendant saw the police, he ran into an apartment building. One of the officers followed the defendant upstairs, and lost sight of him for a moment, then found him on a rooftop. The defendant approached the officer with his hands raised and said "I give up". Fearing for his safety, the officer ordered the defendant to lie on the ground and handcuffed him. The officer then looked around the roof and found a handgun with a live round in the chamber.

The Appeals Court upheld the seizure of the gun. The court noted that under federal law the defendant had not been "seized" within the meaning of the fourth amendment when he discarded the gun on the roof of the apartment while running from the officer. Chasing the defendant was not a seizure because a seizure requires either application of physical force or submission of the person to an assertion of authority. Since the defendant had not been seized by the police, they were not required to have any reasonable suspicion that the defendant was engaged in a crime before picking up the discarded gun. Without deciding whether

the state constitution requires that an officer have reasonable suspicion to justify chasing the defendant when he flees, the court found that even if there was a seizure under state law, the officer had reasonable suspicion to seize the gun based on the combination of the location of the incident, the officer's knowledge of the suspect's previous criminal involvement, and the unprovoked flight from the police.

Officer properly conducted protective weapons-frisk where he had reason to suspect that a gun was being carried in public in a situation that objectively gave rise to public safety concerns. Commonwealth v. Johnson, 36 Mass. App. Ct. 336 (1994). A police officer on patrol was informed by a neighborhood person known to him that a woman down the street was carrying a handgun in her black purse. She pointed the woman out, and the officer drove his cruiser down the street, got out, and approached the defendant. The defendant was carrying a black handbag, and was shouting angry obscenities at a man across the street. When the officer told her to quiet down, the defendant yelled obscenities at the officer, and continued to shout at the man across the street. The officer again warned her to quiet down, but without success. The officer then told the defendant that she was under arrest for disorderly conduct, and, concerned for his safety in the circumstances, patted down the handbag. The officer felt the gun, seized the bag, opened it, and took the gun, which was loaded. The defendant claimed that the officer was not justified in patting down the handbag and seizing the gun.

In concluding that the seizure of the gun was proper, the Appeals Court noted that the carrying of guns in public is a matter of serious public safety concern, and that a report from a known citizen that a gun is being carried in public warrants investigation by the police. The Court concluded that in the present case the officer could reasonably apprehend that the defendant was not wholly in control of herself and that condition, coupled with her reportedly being armed with a handgun, presented a danger to public safety. The Court noted that nothing in Commonwealth v. Couture, 407 Mass. 178 (1990), prevents an officer from effecting a protective weapons-frisk where the officer has reason to suspect that a gun is being carried in public in a situation that objectively gives rise to public safety concerns.

Officer had no reasonable suspicion justifying order for defendant to spit out what was in his mouth. Commonwealth v. Houle, 35 Mass. App. Ct. 474 (1993). Two officers were on patrol in an area known for prostitution and drug activity. They saw a couple seated in a parked pickup truck. Concerned that the

female might have been engaged in prostitution, both officers, who were in uniform, approached the truck. One officer asked the couple what they were doing, and the female responded that they were waiting for "Bill". The woman pointed to the defendant who was walking in their direction and indicated that he was "Bill". One officer asked the defendant if he was "Bill", and the defendant gave a response which the officer could not understand. It appeared to the officer that the defendant had something in his mouth, and he ordered the defendant to "spit it out". The defendant spit out several vials of crack cocaine. The officer had been involved in numerous drug arrests in which suspects were concealing crack vials in their mouths.

The Appeals Court concluded that, although approaching the defendant and asking if he was Bill was such a brief investigative encounter that it did not rise to the level of a stop or seizure, ordering the defendant to spit out what was in his mouth was a seizure. The Court further concluded that at the time the officer ordered the defendant to spit out what was in his mouth, the officer had no basis for suspecting that the defendant was involved in drug activity. The court noted that the facts known to the officer may have been sufficient to give rise to a hunch, but did not provide the basis for a reasonable suspicion that the defendant was concealing drugs or committing any other crime.

Aerial surveillance of backyard, where police had reasonable suspicion that illegal activity was occurring there, was proper. Commonwealth v. One 1985 Ford Thunderbird Automobile, 416 Mass. 603 (1993). A confidential informant told the police that the claimant was growing a large quantity of marijuana in a swimming pool at his parents' home. Based on that information, the police flew over the house in a helicopter three times--once at 1,500 feet, once at 800 feet, and once at 700 feet. On each pass, the officers could clearly see in the backyard an in-ground swimming pool which had been drained. Visible to the naked eye were between 200 and 400 potted plants in the bottom of the pool. Using binoculars, one of the officers was able to determine that the plants were marijuana. The officers took photographs of the swimming pool. The back yard is surrounded by heavy vegetation and a six feet high stockade fence. From the street in front of the house, all that can be seen is the house and the vegetation. There was no indication that anyone looking through a crack in the fence could see the marijuana. The defendant claimed that the aerial surveillance was an illegal warrantless search.

Noting that the United States Supreme Court has already concluded on similar facts that aerial surveillance at 400 feet did not constitute an illegal search under the federal

constitution, the Supreme Judicial Court concluded that the helicopter surveillance also did not violate the state constitution. Although the claimant had a subjective expectation of privacy in the well-shielded backyard, the SJC concluded that that expectation was not one what society would recognize as objectively legitimate, and therefore is not protected under the state constitution. Helicopter flight at this altitude is legal, and the police had a right to be where they were. Although the SJC did not consider that factor conclusive, the Court noted that it must be considered in determining whether an individuals' expectation of privacy is objectively reasonable. In concluding that the claimant's expectation of privacy was not objectively reasonable, the court also relied on the facts that the police had a detailed tip from a confidential informant which provided reasonable suspicion that illegal activity was occurring, and that it appeared that the claimant anticipated that his activity might be observed by individuals flying over in an aircraft, because he acquired a green mesh net to cover the plants.

II. ADMISSIONS AND CONFESSIONS

Incriminating statements made by defendant during officer's preliminary inquiry about motor vehicle accident were properly admitted. Commonwealth v. Smith, 35 Mass. App. Ct. 655 (1993). The defendant was the driver of a van that struck and killed two pedestrians. Within minutes of the accident, the police stopped the van. As the police approached the van, the defendant stated, "Why did you stop us? We didn't hit anything". The police then asked why the van had damage to its front end, and the defendant responded, "I don't know". During that exchange, the officer smelled alcohol on the defendant's breath, conducted field sobriety tests, then arrested the defendant. The defendant moved to suppress the two statements he made to the police before his arrest, claiming that he was being detained by the police and should have received Miranda warnings.

The court noted that Miranda warnings are required when officers have begun custodial interrogation, and that, although when an officer makes a motor vehicle pull over, the driver is not free to leave, "it would surely be untoward to require that a police officer approach a stopped vehicle declaiming the Miranda warnings." The Court ruled that the defendant's initial statement that he "had not hit anything" was volunteered by him before he was asked a question by the police officer, and therefore was not interrogation. The Court also ruled that the second statement was not the product of custodial interrogation, because police are permitted to make some preliminary inquiry of operators in connection with motor vehicle accidents. The court

noted that asking the defendant what had happened to his obviously damaged car, especially when he had volunteered that he had not hit anything, was consistent with the officer's duty to take some preliminary steps before focussing on him as a suspect and detaining him.

Miranda rights properly given to, and validly waived by, Portuguese-speaking defendant. Commonwealth v. Alves, 35 Mass. App. Ct. 935 (1993). The defendant, a Brazilian immigrant who spoke only Portuguese, stabbed and killed his girlfriend. At his booking, a police officer who spoke Portuguese fluently read the Miranda warnings to the defendant by translating an English version to Portuguese. The defendant then read aloud the warnings written in Portuguese. This process was repeated before a state trooper prior to the questioning of the defendant. After each recitation of the warnings, the defendant indicated that he understood those rights. The defendant then wrote that he "understood perfectly" the rights read to him. The defendant then made inculpatory statements to the officers. The defendant claimed that his foreign background, the language barrier, and his unfamiliarity with the American legal system prevented a voluntary, knowing, and intelligent waiver of his Miranda rights.

The Appeals Court held that the warnings were properly given and that the defendant's waiver was valid, noting that he answered all the questions asked by the officers in a responsive, coherent, rational manner, and did not halt the booking process or the subsequent interrogation to complain that he could not understand the officers. The court also concluded that minor errors in the written Portuguese Miranda card did not impair the defendant's understanding of the rights. The errors included the exclusion of the word "right" in the section intending to convey the right to speak to an attorney; the court noted, however, that the card accurately described the right to cut off questioning at any time and consult an attorney, and accurately asked if the person was willing to talk without an attorney present. The court also dismissed the defendant's claim that the police interpreter was inherently biased, noting that there is no authority requiring police to produce an independent interpreter.

Court must consider voluntariness of statements made to private citizens. Commonwealth v. Hunter, 416 Mass. 831 (1994). The defendant made incriminating statements to fellow prisoners the day of his arraignment. That same day, the defendant was examined by a court psychiatrist who concluded that his mental competency was questionable, and was then committed to Bridgewater State Hospital for further examination. The

defendant claimed that the statements were not made voluntarily, because he was not mentally competent at the time. The trial judge denied the defendant's request for an evidentiary hearing on the issue of voluntariness, because he believed such a hearing was unnecessary in cases where statements are made to private citizens.

In reversing the defendant's first degree murder conviction, the Supreme Judicial Court reiterated that when the voluntariness of a defendant's statements to private individuals is in issue, the judge must conduct a voir dire to determine the voluntariness of the statements beyond a reasonable doubt before allowing the evidence to go to the jury. Further, the jurors must be instructed that they can consider the statements only if they find that the statements were voluntary beyond a reasonable doubt In the present case, the defendant adequately raised the issue of the voluntariness of his statement by making the motion for an evidentiary hearing and submitting an affidavit that stated that he was incompetent at the time and that a psychiatrist had doubts about his competency to stand trial.

III. IDENTIFICATION

Where Commonwealth failed to ask identifying witness whether he could recognize the photo he had selected earlier, officer's testimony concerning identification should not have been admitted. Commonwealth v. Muse, 35 Mass. App. Ct. 466 (1993). At the defendant's trial for assault with intent to murder, two eyewitnesses, who had known the defendant for a long time, testified that the defendant fired a shot in the victim's direction. They both testified that they selected the defendant's picture from a photo array at the police station following the incident. They both made in-court identifications of the defendant as the gunman. A third witness testified that he selected a photograph of the person he was certain was the gunman. However, at trial he was not shown any photographs or asked which photograph he selected, and he made no in-court identification. The detective who showed the witnesses the photo array testified that the third witness selected a photograph that the detective knew to be the defendant.

The Court noted that where a witness acknowledges that he made a prior identification but cannot or will not identify the defendant at trial, testimony about the witness's identification from a person who observed it has been allowed in some situations. To be admissible, the evidence about the identification must be reliable and its use must not violate the defendant's right to confront witnesses. The Court noted that generally, if both the witness and the person who observed the

identification are available at trial for cross-examination, the defendant's right of confrontation will be deemed to have been satisfied. However, the SJC has held that the Commonwealth's failure to ask the identifying witness at trial whether he was able to recognize the photograph he had earlier selected precluded the officer's testimony that the witness selected the defendant's photograph. Therefore, the court concluded, the trial judge in this action should have allowed defense counsel's objection to the detective's testimony. However, because the detective's testimony was consistent with the third witness's testimony, and given the strength of the other identification evidence supplied by the first two witnesses, the Court concluded that the error was harmless, and the conviction was affirmed.

Introduction of unsevered, unsanitized mugshots was reversible error. Commonwealth v. Gee, 36 Mass. App. Ct. 154 (1994). The photographs used in a photo array were introduced into evidence. Each photo was a double-pose picture of an Asian male standing against a height chart. Each had a placard with the inscription "POLICE DEPT., BOSTON, MASS", an identification number, and the date the photograph was taken. The defendant claimed on appeal that he was entitled to a new trial because the mug shots indicated to the jury that he had a prior criminal record.

In reversing the conviction, the Appeals Court noted that, because of the placards appearing in the photographs, there was little doubt that the police had the defendant's picture at a time prior to the date of the offense for which we was being tried. Moreover, the detective who conducted the photographic identifications testified that the defendant was arrested after he had been identified from the array. The court noted that the strongest evidence against the defendant was the fact that two witnesses selected his picture from the same array of photographs, and that focus on the photographs invites attention to the defendant's prior involvement with the police. The Court concluded that any reasonable doubt by the jury about the ability of the witnesses to identify the defendant might have been resolved upon the basis of his prior involvement with the police.

Successive photographic arrays that contain defendant's picture shown to same witnesses not improper. Commonwealth v. Wallace, 417 Mass. 126 (1994). As part of a murder investigation, the police showed eyewitnesses two separate arrays of photographs. One array contained black and white photos and the other contained color photos. Both arrays contained the defendant's photograph. Each witness viewed the photos alone and viewed only one photo array at a time. Two of the witnesses identified the defendant. The defendant filed a motion to suppress the

photographic identification on the grounds that the procedure used by the police was unnecessarily suggestive because the defendant was the only person whose picture appeared in both the black and white array and color array. The Supreme Judicial Court ruled that duplication of a defendant's photo in one or more arrays is not enough by itself to require suppression of the identification. Since the defendant made no other claim challenging the arrays, evidence of the identifications was properly introduced.

IV. NARCOTICS

A. Entrapment

Defendant can raise defense of entrapment and also deny committing the crime. Commonwealth v. Tracey, 416 Mass. 528 (1993). At trial on an indictment for trafficking in cocaine, the defendant testified that he was repeatedly contacted by an acquaintance, Grover, asking that the defendant put him in contact with McCratic, another acquaintance of the defendant and an alleged dealer, for a drug deal. He met with Grover and Thomas, an undercover State Trooper, on several occasions. The defendant claimed that the Trooper acted like a "tough guy", and, despite the fact that he continually told Grover and Thomas that he did not want to be involved, and suggested they contact McCratic directly, the Trooper insisted that he wanted to deal with the defendant. The defendant claimed that he eventually contacted McCratic only to tell him that Grover and Thomas wanted to deal with him, and warned McCratic not to get involved. The defendant also testified that he was present when the deal took place only because he was trying to tell McCratic to return Thomas' money. The trial judge refused to give an entrapment instruction.

The SJC held that a defendant may claim entrapment while also denying committing the crime. The Court further held that there was sufficient evidence of entrapment in the present case to warrant an entrapment instruction. The court noted that the threshold for the defendant to raise the entrapment defense is low; the judge should not consider credibility, but only whether there is any evidence sufficient to raise the defense, even if the evidence is unsubstantial and even if the evidence comes solely from the defendant's testimony. Conduct which may show more than mere solicitation and possesses the indicia of inducement includes "aggressive persuasion, coercive encouragement, lengthy negotiations, pleading or arguing with the defendant, repeated or persistent solicitation, persuasion, importuning, and playing on sympathy or other emotion". In

holding that the jury should have been instructed on the defense of entrapment in the present action, the court cited the repeated aggressive requests by the undercover agent, the fact that the defendant resisted involvement, and the defendant's testimony that he acted out of fear and frustration as evidence that would support a finding of entrapment.

B. Forfeiture

Person with financial stake in automobile cannot contest forfeiture unless the person also exercises dominion and control over it. Commonwealth v. One 1986 Volkswagen GTI Automobile, 417 Mass. 369 (1994). Police impounded the automobile after they observed a sale of crack cocaine by its operator, Gordon Scott Stover. The Commonwealth brought an action seeking forfeiture of the car on the ground that it was used in violation of G.L. c. 94C, 47. The Superior Court determined that although Gordon's mother was the title owner of the car, and had no knowledge of its use for distributing crack cocaine, Gordon exercised dominion and control over the car, and that he was therefore its "owner in fact." In reaching this conclusion, the Superior Court noted that the car was parked regularly at an address in Greenfield, where Gordon lived, and not in Springfield, where his mother lived. In addition, Gordon rigged the car with an elaborate sound system that was intended for his benefit, and not the benefit of his mother. The mother appealed from the judgment ordering the car forfeited.

The Supreme Judicial Court concluded that a person with a financial stake in an automobile does not possess sufficient ownership to contest its forfeiture unless the person also exercises dominion and control over the vehicle. In so concluding, the Court noted that, in determining whether an ownership interest exists, the courts look top indicia of dominion and control such as possession, title, and financial stake, and that ownership should be determined by looking to who would actually suffer from its loss. Here, the court concluded that Gordon exercised control over the car and would suffer the loss occasioned by the car's forfeiture.

V. SEX OFFENSES

A. Fresh Complaint Evidence

Under circumstances, testimony of victim's "fresh complaint" made thirty-four months after rape, was admissible. Commonwealth v. McKinnon, 35 Mass. App. Ct. 398 (1993). The defendant was convicted of the rape of his stepdaughter, who was seven at the

time of the rape. The victim had first mentioned the rape to her mother thirty-four months after the incident. The issue on appeal was whether the mother's testimony about this conversation was admissible as fresh complaint evidence.

The court noted that while there is no bright-line time period for determining if a complaint is "fresh", there are limits beyond which a complaint will be pronounced stale. While thirty-four months was enough to provoke "unease", it was not long enough to exclude the testimony as a matter of law. Therefore the court focused on the circumstances of (1) the victim's explanation for the delay in reporting the alleged abusive episodes, such as an understandable and credible fear of retaliation, and (2) the circumstances of the report itself. The court found that evidence of an environment of fear and violence created by the defendant, particularly from the perspective of a young child, was sufficient to support the explanation for the delay; before the rape, the victim had seen the defendant, gun in hand, pursuing her naked mother out of the house in her mother's effort to protect herself. Later, the victim witnessed more violence, and saw it more frequently: the defendant kicking, hitting, spitting at, and punching her mother. Although the victim then went to live with her natural father, the court found that the fact that she was not immediately threatened by violence from the defendant did not matter where she could reasonably have feared violence against her mother or herself if she were to come forward.

The court found that the circumstances of the complaint, which was made during the course of a telephone conversation by the victim to her mother in which she asked if what her stepfather had done was the cause of her early onset of menses, were understandable, and showed no reason to fabricate. The court ruled that the fresh complaint testimony was admissible, and affirmed the conviction.

B. Jury Voir Dire

In cases involving sexual offenses against minors, judge must individually interrogate each prospective juror as to whether juror was victim of childhood sexual offense. Commonwealth v. Flebotte, 417 Mass. 348 (1994). The defendant, during his trial for rape of a child, claimed that the jury venire should have been questioned on whether any individual therein was a victim of a childhood sexual assault. The trial judge denied the request, and instead questioned the jury on their objectivity. During deliberations, the foreman notified the judge that one juror mentioned that he had been the victim of a childhood sexual assault. That juror was excused. The judge then conducted a

voir dire examination of each remaining member of the jury. Another juror was dismissed because his impartiality may have been affected by his learning that the first juror had been sexually abused.

The Supreme Judicial Court concluded that the trial judge did not commit error in denying the defendant's request, but that, in cases tried after the opinion involving sexual offenses against minors, on request, the judge must individually interrogate each prospective juror as to whether the juror has been the victim of a childhood sexual offense. The Court reached this decision because it concluded that in such instances there is a reasonable probability that prejudice would influence the jury, and that adult victims of childhood sexual offenses may be reluctant to come forward when asked a general question about objectivity.

C. Testimony of Child Witness

Victim, who was five years old at time of trial, was competent to testify about incidents that occurred when she was between twenty-two and thirty-three months old. Commonwealth v. Gamache, 35 Mass. App. Ct. 805 (1994). The defendant was convicted of aggravated rape and rape of her daughter. The victim was five years old at the time of trial and was between 22 and 33 months old at the time of the incidents. The defendant claimed that the victim should not have been allowed to testify, alleging that, because of victim's age, she was not competent to testify. The Court noted that although age is a factor in determining competency, the test to determine competency is whether (1) the victim has the ability or capacity to observe, remember, and express what he or she has experienced, and (2) whether the victim understands both the difference between truth and falsehood and the obligation and duty to tell the truth.

The Court held that notwithstanding the victim's inability to remember her date of birth, as well as some significant events which took place at the same time as the rapes, she appeared to have the required "general ability" to observe and remember. The court noted that a child's inability to place events in a temporal framework does not render the child incompetent.

Court cannot permit child witness to testify with his or her back to the defendant. Commonwealth v. Johnson, 417 Mass. 498 (1994). During the defendant's trial on two indictments charging rape by force of a child under sixteen years of age, at the Commonwealth's request the court allowed a special seating arrangement in which the two victims, then age eight and ten years old, were permitted to testify while sitting near the court

reporter's table, facing the jury box, with the questioning attorney facing the child.

The Supreme Judicial Court concluded that the seating arrangement, in which the defendant could not see the faces of the witnesses while they testified, violated his state constitutional right "to meet the witnesses against him face to face". The Court noted that ruling that the judge may not permit a child witness to testify with his or her back to the defendant does not preclude the judge from implementing other procedures to decrease the stress and trauma that a child witness may suffer, upon a sufficient showing by the Commonwealth of a compelling need for the use of such procedure.

VI. MISCELLANEOUS

A. Defense of "Honest and Reasonable Mistake"

Defense counsel was ineffective for failing to request instruction on "honest and reasonable mistake of fact", when defendant claimed he believed the property he stole was his. Commonwealth v. Gelpi, 416 Mass. 729 (1994). The defendant was convicted of armed robbery for taking cash and a cross and chain from another. The Appeals Court reversed the conviction, and the Commonwealth sought further appellate review in the SJC, which was granted. The issue on appeal was whether the defendant was denied effective assistance of counsel by his attorney's failure to request an instruction on the defense of an "honest and reasonable mistake of fact" regarding ownership of the property. At trial, the arresting officer testified that, after advising the defendant of his rights, the defendant said that the victim gave him the chain and cross as collateral because the victim owed the defendant money from "a deal". The SJC ruled that the defendant was entitled to have the jury consider whether the defendant mistakenly believed that the property was his, and that the failure of counsel to request such an instruction was ineffective assistance of counsel. Accordingly, the conviction was reversed.

B. Civil Rights Injunction

Injunction ordering police officers to refrain from using excessive force, and to report knowledge of the use of excessive force, was proper. Commonwealth v. Adams, 416 Mass. 558 (1993). Shortly after sunrise, Smith, who had been consuming cocaine, was sitting in his parked motor vehicle. When he drove away, officers in a police cruiser followed him, believing that his behavior warranted a brief threshold inquiry. Smith drove

through a red light, then committed several additional traffic violations. At no time did he exceed the speed limit. The officers who were following Smith advised their dispatcher of the situation, and were then joined in the pursuit by several other officers. During the pursuit, Smith swerved his car toward two of the police cruisers, threatening a collision.

The chase ended when Smith's engine died. One of the officers drove his cruiser into the driver's side door of Smith's car, then backed away. There were then eight armed officers surrounding Smith's car, which was boxed in by police cruisers. When Smith refused to get out of his car, two of the officers broke both the driver's side window and the passenger side window of the car. Smith was then dragged out of the car through a window, although they could have more easily removed Smith by opening the door. The court noted that each of the officers were aware that Smith was unarmed, and Smith did not attempt to strike any officer or flee or avoid arrest. The judge found that several officer "'hurled themselves on top of Smith' to punish him for leading the police in the chase," whereupon Smith suffered contusions, cuts, and bruises. Smith was handcuffed behind his back, face down on the pavement. When Smith raised his head or body, one of the officers would push him back with a foot. The court noted that each defendant saw what was happening, approved of it, and made no attempt to protect Smith. The court further noted that no supervisor was present, and no officer had authority over any other officer. Despite a department rule requiring each defendant to report visible injuries and the names of all persons involved, no defendant did so.

The Superior Court enjoined thirteen officers from using excessive force while in the performance of police duties, from failing to report to the proper authorities knowledge of visible injuries occurring in the course of an arrest, and from failing to report to the proper authorities knowledge of the use of excessive force by any officer in their department in the performance of that officer's duties.

The defendant officers appealed the grant of injunctive relief. In affirming the judgment, the SJC held that the lower court properly concluded that all the defendants, including the "non-battering" officers, violated Smith's civil rights, because they knew excessive force was being applied, knowingly approved and permitted the use of excessive force, and shared the mental state of those applying that force. The Court noted that in appropriate circumstances, a judge has discretion to enjoin future police misconduct. Where there is a single, egregious incident involving a collective violation of a citizen's rights and a collective failure to prevent or report that violation,

issuance of an injunction is appropriate, where, as here, without any injunction, the defendants will regard themselves as free to continue their unlawful conduct. The SJC noted that the judge was entitled to consider the defendant's lack of candor (each defendant denied that any incident involving excessive force occurred, and professed difficulty in identifying which officers were present), and their failure to report the incident, in deciding whether sanctions were necessary. Finally, the Court concluded that the judge was warranted in not limiting the injunction to acts involving only Smith, because the case involved an abuse of the defendants' power under the law, and involved defendants who failed to understand that what they did and did not do was wrong and in violation of police department regulations. Moreover, the injunction placed no new restraint on the defendants, and stated the law under which the defendants must conduct themselves in any event.

C. Sufficiency of Evidence of Particular Crimes

Circumstantial evidence supported conviction for motor vehicle insurance fraud. Commonwealth v. Chery, 36 Mass. App. Ct. 913 (1994). The defendant reported his 1988 Ford Escort stolen from his driveway in Malden. Police found the car the same day in Somerville, near where the defendant worked. The car was locked, with no keys in the car. There was no sign of tampering with the locks or ignition. Someone had started a fire inside the car, but it burned itself out because the windows were fully closed.

The court noted that the car was an unlikely candidate for theft. It was a 1988 Ford Escort which had been in several accidents and had considerable and visible damage. The defendant had financed the purchase of the car, which required an aggregate payment of $12,000. The defendant claimed that the evidence was insufficient to support his conviction for motor vehicle insurance fraud.

The Appeals Court concluded that the evidence permitted the jury to infer that the defendant controlled the car keys, which had been used to move the car from the defendant's driveway to the town where he worked; that whoever made a futile attempt to burn the car had a set of keys, since the car was otherwise secure; that the defendant had a motive for attempting to obtain insurance proceeds to pay off his car loan; and that it would be unlikely that someone would steal the defendant's damaged Ford Escort.

There was sufficient evidence of defendant's guilt in addition to fingerprint to justify submitting case to jury. Commonwealth v. Keaton, 36 Mass. App. Ct. 81 (1994). The defendant was convicted

of aggravated rape and breaking and entering in the nighttime with intent to commit assault. The victim was alone in her apartment. Sometime after 1:00 a.m., she was awakened by the defendant who was in her bedroom straddling her body on her bed. The defendant covered the victims face with a cloth, raped her, then went to the kitchen and returned with a glass of water. The defendant gave the glass of water to the defendant, which she drank by holding the stem of the glass. The victim's face was covered during the attack and subsequent confrontation with the defendant, so she could not identify her attacker. As the defendant left the apartment, he locked the door, which can be locked from the outside only with a key. After five or ten minutes, the victim then opened her apartment door and saw the defendant, her next-door neighbor, in the hall alone. The defendant did not respond to her repeated pleas for help. The defendant was the maintenance man at the apartment building during the preceding year, giving him access to keys to the apartment. The defendant's thumbprint was found on the glass from which the victim drank.

On appeal, the defendant contended that the Commonwealth's case was based solely on the fingerprint found on the glass. While the presence of a fingerprint is not by itself sufficient to submit a case to the jury, the Appeals Court held that there was other evidence to suggest the defendant was the attacker, including the victim's direct testimony that the defendant held the glass during commission of the crime, and that there were no other times that the defendant could have touched the glass, that the defendant was present at the scene of the crime shortly after it occurred, and displayed consciousness of guilt by his actions when the victim asked for help.

D. Evidence

Conviction affirmed where part of evidence was DNA-matching evidence, but court split on admissibility of such evidence. Commonwealth v. Daggett, 416 Mass. 347 (1993). The Supreme Judicial Court affirmed a first-degree murder conviction in which part of the evidence was DNA matching of the victim's blood with blood found in the defendant's workplace and in the trunk of his car. The Court split on the question of admissibility of the DNA-matching evidence.

Two of the five justices concluded that the DNA matching evidence was not admissible because: (1) the evidence cannot be presented to the jury without explaining the statistical likelihood that the blood was not the victim's, but matched the victim's simply based on chance; and (2) the method used to calculate those statistics is not generally accepted by the

relevant scientific community (does not meet the Frye test). Nevertheless, those two justices did not consider the admission of the DNA evidence in this case to be reversible error, because the other evidence linking the defendant to the crime (blood matching by traditional means, matching of the victim's hair to hair found in the trunk of the defendant's car, matching of the defendant's pubic hair to pubic hair found on the victim's body, matching of paint chips from the trunk of defendant's car to chips found on the floor of defendant's workplace and on the victim's socks (the only clothing on her body when it was found), and the discovery of the victim's burned clothing in the basement of the defendant's workplace) presented overwhelming evidence of his guilt, and the DNA evidence was not so strong as to cause prejudice.

Two justices concluded that the DNA evidence was admissible, noting that the explanation of the probability that a match occurred simply by chance need not be made in particular, "numerical" terms. Finally, one justice agreed that the conviction should be affirmed because the defendant was not prejudiced by the admission of DNA evidence. That Justice did not comment on the admissibility of the evidence.

Fact that Commonwealth misplaced evidence for six years did not require its suppression at second trial. Commonwealth v. Olszewski, 416 Mass. 707 (1993). The defendant was convicted (after having his original conviction overturned by the SJC) of murdering his ex-girlfriend in 1982. The Commonwealth's proof relied primarily on the defendant's confession to his friend that the defendant had choked the victim with his hands, wrapped a belt around her neck, dragged her from her car, stomped on her neck, ran her over several times with her car, threw the body in the back seat, then threw it out of the car after driving to another town. The defendant's first conviction was reversed because a great deal of physical evidence, including the belt, as well as some written witness statements supporting an alibi, had been lost or destroyed.

Just before the second trial, some of the evidence, including the belt, turned up, and the trial judge held a hearing and made detailed findings about the missing evidence and its prejudicial effect on the defendant. The trial judge concluded that some of the evidence should be suppressed. On appeal of his second conviction, the defendant argued that the belt should not have been introduced at trial. Because the defendant could not suggest what evidence that would have been favorable to his case was lost during the period of time the belt was misplaced, the trial judge properly ruled that the belt was admissible. When the belt was recovered, it was examined by experts from both

parties. The court noted that, as a remedy for the loss of evidence, and the failure immediately to disclose its recovery, the defendant was entitled to introduce evidence about the Commonwealth's negligent handling of the physical evidence.

The defendant also asked the SJC to dismiss the indictment because of police conduct with respect to his friend, Strong's, statements about the defendant's confession to him. Soon after the murder, Strong made a short statement to the police supporting the defendant's alibi. Two weeks later he returned to the police, recanted the alibi testimony, and told them about the defendant's confession. At some point, the police left Strong alone with the only copy of his first statement, which he tore up. The trial judge and the SJC both believed that the police conduct was improper, but was not sufficiently egregious to warrant dismissal of the indictment. The Court noted that the general contents of the first statement were known, and the defendant was permitted to cross-examine fully concerning its making and destruction; therefore, its loss did not seriously impair the defense.

E. Standing to Challenge Executor

District Attorney had standing to challenge defendant's suitability as executor of wife's estate where defendant was suspect in her death. District Attorney for the Norfolk District v. Magraw, 417 Mass. 169 (1994). Nancy Magraw executed a will naming the defendant, her husband, as executor. The marriage deteriorated and the couple were separated. Nancy Magraw was found dead in her home, apparently the victim of a homicide. The defendant thereafter assumed his duties as executor of her estate.

A criminal investigation into the cause of Nancy Magraw's death began, and the defendant was considered a suspect. The grand jury investigating the death sought to question Nancy Magraw's lawyer and psychotherapist about conversations she may have had with them about the defendant. The defendant, in his capacity as executor, refused to waive his wife's attorney-client and psychotherapist-patient privileges. The district attorney filed in Superior Court a motion to compel the testimony of the lawyer and therapist, which was denied. The district attorney then petitioned the Probate Court to remove the defendant as executor on the ground that a conflict of interest rendered him unsuitable. The petition was denied, and the district attorney appealed.

The Supreme Judicial Court concluded that the district attorney had standing to contest the defendant's suitability as executor. The Court noted that the Probate Court has the power

to remove an executor, and that power is not limited to circumstances where it is petitioned by interested parties. Noting that it had previously stated that a public officer who has a duty to perform, or a right to vindicate, in any Probate Court proceeding is considered an aggrieved person and can appeal an adverse decision, here, where the district attorney has a duty to fully investigate a homicide, he had standing to challenge the defendant's suitability as executor.

The Court also concluded that a representative of the estate of a deceased person has the authority to waive the decedent's attorney-client and psychotherapist-patient privileges.

Finally, the Court held that the probate judge should have removed the defendant as executor of his wife's estate because he had a conflict of interest. The defendant as a suspect in his wife's death had an interest in keeping from authorities any information which had the possibility of inculpating him. This interest created a reasonable doubt that he honestly, fairly, and dispassionately could execute his responsibilities as executor of his wife's estate.

F. Failure to Timely Arraign Defendant

Bail hearing in defendant's absence, and failure to bring defendant before court at first available opportunity, was improper. Commonwealth v. Perito, 417 Mass. 674 (1994). On Tuesday, February 21, the defendant was arrested. The defendant, who was injured, was taken to a hospital, and bail was set later that day by a judge in a court while the defendant, who was unrepresented at the bail hearing, was in the hospital. The defendant's case was continued until March 3, and the judge issued a mittimus ordering that the defendant be committed to the house of correction pending his postponed appearance. At noon the next day, the defendant was transported to the house of correction. Later that day, a staff psychologist examined the defendant, found him to be suicidal, and recommended he be committed to Bridgewater State Hospital, where he was sent for observation. The defendant was first brought to court on March 27, after being released from Bridgewater. The defendant claimed that his detention from February 21 to March 27 was illegal because bail was set in his absence and because he was not brought to court for an initial appearance.

The Supreme Judicial Court concluded that the practice of setting bail in the defendant's absence violated his right to be present at, and participate in, his bail hearing. Moreover, the defendant has a right to be brought to court for an initial appearance at the fist available opportunity, have bail set, receive appointed counsel, and be arraigned or have a date set

for arraignment. The Court noted that the purpose of such a rule is to prevent unlawful detention and eliminate the opportunity for application of improper police pressure. In the present case, the court held that, since the defendant was released from the hospital on a weekday at noon, it was unreasonable to transfer him directly to the house of correction until March 3.

Although the defendant's detention was illegal, the Court concluded that there was no basis for dismissing the indictments or suppressing photographic and fingerprint evidence obtained on February 21. The court noted that dismissal of an indictment based on pre-indictment delay is not appropriate unless the defendant demonstrates actual prejudice and misconduct on the part of the Commonwealth intentionally undertaken to gain a tactical advantage, and here the defendant could not make such a showing. The court also concluded that suppression of the evidence, which was obtained during booking, was not warranted, because the police would have obtained the evidence even if he had been taken to court in a timely manner.

ASSISTANCE AND CONTACTS AT THE OFFICE OF THE ATTORNEY GENERAL

Below is a list of individuals at the Office of the Attorney General who you can call for assistance. The Main office number for all extensions listed below is (617) 727-2200. The office address is: Office of the Attorney General, One Ashburton Place, Boston, MA 02108.

	Ext.
Scott Harshbarger, Attorney General	2042
Thomas Green, First Assistant	2057
CRIMINAL BUREAU	
Michael Cassidy, Bureau Chief	2010
Susan Hicks Spurlock, Deputy Bureau Chief	2809
Pamela Hunt, Chief, Appellate Division	2826
Mark Smith, Chief, Public Integrity Division	2846
David Burns, Chief, Narcotics and Special Investigations Division	2517
Lt. Jack Kelly, Chief, Criminal Investigations Division	2838
Martin Levin, Chief, Environmental Strike Force	2812
John Ciardi, Chief, Economic Crimes Division	2858
Walter Sullivan, Chief, Asset Forfeiture Unit	2508
Michael Kogut, Chief, Medicaid Fraud Control Unit	3814
Brian Burke, Chief, Fair Labor and Business Practices Division	727-6824

Law Enforcement Newsletter

FROM THE OFFICE OF THE

Attorney General

For The Commonwealth of Massachusetts

Scott Harshbarger
Attorney General

Contact:(617)727-2200

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NEWSLETTER

September 1994

Letter from the Attorney General: Positive Developments in Crime Fighting and Crime Prevention

To Members of the Law Enforcement and Criminal Justice Community:

I. Introduction

I would like to take this opportunity to welcome you to this newest edition of the Law Enforcement Newsletter. Since our last issue, there have been many positive developments in law enforcement and the criminal justice system that relate to our joint efforts to fight, and prevent, crime in the Commonwealth. This Newsletter will update on these recent developments.

II. State Law Enforcement Legislative Developments and New Initiatives

The Office of the Attorney General has been active in developing and implementing new tools to assist law enforcement in the investigation and prosecution of crimes in the Commonwealth. Some of the recent developments include the following:

* A new bail reform statute has become law which provides a means to hold criminal defendants without bail, if they present a danger to the community;

* Modifications to firearms laws involving domestic violence prevention orders have become law; and

* The laws governing operating under the influence (OUI) offenses were modified to lower the blood alcohol content required to demonstrate a presumption of intoxication; to simplify the means to suspend operators licenses, if they operate while under the influence of alcohol; and to help keep underage drivers who drink from returning to the road.

In addition to these important new laws, Assistant Attorneys General assigned to both my Criminal Bureau and Public Protection Bureau have found innovative ways to utilize existing laws to fight drug dealing from rental property, and to maintain access to medical clinics.

Articles on each of these positive developments are included in this edition of the Law Enforcement Newsletter.

III. Safe Neighborhood Initiative

This summer, our Safe Neighborhood Initiative (SNI) in Dorchester received a $382,971 grant from the federal government, through the Massachusetts Committee on Criminal Justice (MCCJ). I have spoken with United States Attorney Janet Reno about the SNI, and we share the hope and the belief that, with this grant, the project can serve as a model for cities across this state and country to effectively combat urban crime. This innovative program is described more fully later in the Newsletter.

IV. Federal Crime Bill

The federal government has also joined in the local fight against crime. I am particularly excited about the Federal Crime Bill which was recently signed into law by President Clinton and by the renewed activism of the United States Attorney's Office in taking on violent crime under the leadership of U.S. Attorney Don Stern.

The Federal Crime Bill represents an unprecedented federal commitment of resources to fighting crime on the local level. It provides for a total of approximately 400 million crime fighting dollars to go to Massachusetts and the opportunity to put 2,300 new police officers onto our streets.

While the commitment of federal resources to this endeavor is impressive -- $8.8 billion nationwide -- the "Cops on the Beat" program is a partnership and Massachusetts cities and towns will incur some of the costs. There is concern among many local officials that their communities will not be able to meet the required fiscal commitment. To address this concern, I have proposed to the Governor that the state earmark $33 million per year to pay for 50 percent of the local match in the cities and towns that are willing to make the commitment to take part in this program. This type of state commitment will make the Federal Crime Bill a reality for cities and towns.

Other important provisions in the Federal Crime Bill for Massachusetts include:

* $91 million in grants to build new prisons in the state, including military-style boot camps. Massachusetts could receive an additional $91 million, if the state meets the "Truth in Sentencing" targets. Those targets should be met as a result of so many of us in law enforcement working hard to win passage of

the comprehensive sentencing reform bill in the state Legislature, which was signed into law earlier this year; and

* Eligibility for the state's rural communities to seek $2.7 million in federal drug and crime enforcement grants.

I have often stated that the best form of public protection is prevention. In addition to focusing on getting more police officers on the streets and building more prisons, the Crime Bill focuses attention on crime prevention by assisting local communities through the funding of education and employment measures aimed at juveniles, perhaps the most difficult group of criminal offenders to deter through enforcement. The bill further provides money to help the victims of violent crime through police training, services and shelters. In addition, it requires the enforcement of state-issued restraining orders in the courts of other states. Drug treatment is also encouraged in several programs funded by the bill.

I believe that the Federal Crime Bill marks the start of an historic new assault on crime in Massachusetts. Through all levels of government working together, virtually every segment of the Massachusetts population eventually will benefit from the provisions of this bill. We will keep you informed of any developments regarding the Federal Crime Bill, as they become available to us.

V. A Closing Note

I look forward to hearing from you with any questions, comments or suggestions you may have regarding these initiatives and how we can better protect the public.

Any enthusiasm over the strides recently made in giving law enforcement the tools to deal with the changing face of crime in the 1990's is tempered by the sadness we all feel over the recent tragic deaths of several courageous Massachusetts police officers. These officers gave their lives in the line of duty, as have many of their colleagues in the past and around the country. Their memory must inspire us to continue to work together to ensure the public safety.

Sincerely,

Scott Harshbarger

ANNOUNCEMENT

Scott Harshbarger is pleased to announce the Attorney General's Fourth Annual Police Training Conference on Domestic Violence, to be held on Friday, October 21, 1994 from 7:45 a.m. to 3:00 p.m. at Northeastern University's campus in Burlington, MA.

This year's program will include several new segments and a new workshop format. It is intended to provide police officers with specific information to properly address both the complex legal and psychological issues which domestic violence incidents present.

Included among the agenda items will be a morning presentation on the impact of domestic violence on children who have either witnessed or been victims of family violence. The speakers also will give specific suggestions for police officers responding to scenes where children are present, as well as describing how the Department of Social Services Domestic Violence Unit works. There will also be a presentation on recent legal developments in domestic violence law, covering the new District Court Standards for Judicial Practice, implementation of the new firearms law, and the application of standard Miranda and search and seizure principles to domestic violence cases. In addition, an expert panel, including a victim and a batterer's treatment specialist, will answer questions from program participants and focus upon ways in which the nature of the police response can affect the likely outcome of a case. The importance of effective documentation of a domestic violence incident will be demonstrated through a mock direct and cross examination of a police officer. Finally, there will be concurrent afternoon workshops on different topics, among which the participants can choose. We are also exploring the possibility of a specialized presentation on the domestic violence stalker.

I hope you will join me on Friday, October 21, 1994, at Northeastern University for the Fourth Annual Domestic Violence Training Conference. **To register staff from your department**, or if you have any questions, please contact Sheila Martin, Conference Coordinator, at (617 727-2200. Reservations must be made **as soon as possible**. The program registration fee, which covers written materials, lunch, coffee and pastry, is $30.00 per officer.

NEW LAWS/LEGISLATIVE ACTION

Legislative Analysis: Chapter 24 of the Acts of 1994: "An Act Relative to Firearms"

Diane Juliar, Assistant Attorney General
Chief, Family and Community Crimes Bureau

On May 25, 1994, Governor Weld signed Chapter 24 of the Acts of 1994, An Act Relative to Firearms, amending both the state firearms laws and c. 209A, the Abuse Prevention Act. Most provisions of the law went into effect on Friday, July 1, and changed the courts' responsibilities in issuing c. 209A orders, the responsibilities of police in serving c. 209A orders, and the criteria governing the issuance of firearm identification (FID) cards and licenses to carry (LTCs) by licensing authorities.

In brief, the legislation addresses two areas:

(1) It establishes the crime of Trafficking in Firearms; and

(2) It requires that, upon issuance of an emergency or temporary c. 209A order, a court also order a defendant to surrender his gun, firearms identification card, and license to carry (hereinafter referred to as a "suspension and surrender order"). It also disqualifies a person who is the subject of a suspension and surrender order from obtaining a firearms identification card or license to carry firearms.

SUMMARY OF THE LEGISLATION

A. DOMESTIC VIOLENCE The legislation adds a new Section 3B to Chapter 209A, the Abuse Prevention Act, which provides:

I. Initial Action Upon Issuance of a C. 209A Order

(a) Court Action

(1) Upon issuance of an emergency or temporary (10-day) order under c. 209A, if the plaintiff demonstrates a substantial likelihood of immediate danger of abuse (the standard for issuance of such an order), the court shall order the defendant to immediately surrender all guns and ammunition he possesses, as well as any firearms identification card and license to carry he holds, "to the appropriate law enforcement officials."

(2) The court also shall order the immediate suspension of the defendant's FID card and license to carry.

(3) Notice of the suspension and order to surrender will be attached to the copy of the abuse prevention order to be served on the defendant.

(b) Police Action

(1) Upon serving the order, with the notice of suspension and order to surrender attached, law enforcement officials "shall immediately take possession" of all guns, ammunition and gun permits in the defendant's "control, ownership or possession."

(2) Failure of the defendant to comply with the surrender order is made a misdemeanor, punishable by imprisonment for up to 2-1/2 years and/or a fine of up to $5,000.

II. Related Issues

(a) Access to Permit Information: Ideally, police would routinely check, prior to serving the c. 209A order, whether the defendant holds an FID card or LTC. We have been informed that the computerized records at the Firearms Bureau of the Department of Public Safety are almost up-to-date in data input. However, as of this date, they are accessible only from 9:00 a.m. to 5:00 p.m., Monday through Friday, through telephone or teletype inquiry. Various parties are working towards increasing local law enforcement access to these records by, first, ensuring round-the-clock coverage at the Firearms Bureau to respond to local police requests for information, and, second, providing direct local police access, by computer, to the records. For now, however, access is limited.

(b) Notification to Original Licensing Authority: If police serving the order become aware that the defendant holds an FID card or LTC, police should consider routinely informing the licensing authority that issued the permit of the existence of the protective order.

(c) If No In-Hand Service: If in-hand service of the order is not possible, the order in effect will require that the defendant take affirmative steps to surrender any guns and permits, presumably to the local police where he resides.

(d) Failure to Surrender Weapons: If an officer has reason to believe that a defendant subject to a suspension and surrender order has guns, there are several means available to take possession of them. First, police may use all lawful means currently available to them to take possession of the weapons (for example, consent of a co-inhabitant of the dwelling, search incident to arrest, etc.).

Also, in the case of the licensed gun owner, since his permit is suspended (and, in addition, since c. 209A, § 3B creates a new misdemeanor offense of violation of the surrender order), police having probable cause to believe the defendant has guns and/or permits, but is failing to surrender them, can and should seek issuance of a search warrant, if adequate information as to where the items can be found is available. Generally, the information in support of a search warrant application in these cases could be provided by the complainant.

(e) Unlawfully-Held Guns and Stolen Guns: If there is probable cause to believe a defendant possesses guns unlawfully (that is, without an FID card or LTC), or possesses stolen guns, police whenever possible should seek issuance of a search warrant for the guns rather than relying on the court's order to surrender them. If the defendant surrenders guns in response to the court's order, this could be considered a compelled surrender of the weapons in violation of the defendant's rights under Article 12 of the Declaration of Rights of the Massachusetts Constitution, in which case the defendant could not be successfully prosecuted for unlawful possession of any guns surrendered (or for failure to surrender them). To avoid precluding prosecution for unlawful possession of the guns, a search warrant should be sought if sufficient information exists to support one.

(f) Arrest for Violation of Surrender Order: The mandatory, warrantless arrest provisions in G.L. c. 209A do not apply to violation of a suspension and surrender order. Therefore, all existing law with regard to arrest applies. It appears the police must seek a criminal complaint and arrest warrant from the clerk-magistrate unless there are other grounds for arrest. Again, if there is probable cause to believe that the guns are unlawfully held or stolen, a search warrant should be sought initially.

(g) Defendant Information Form: The Trial Court has drafted a Defendant Information Form, to be filled out by a c. 209A plaintiff and transmitted by the court to the police, to assist in safe and speedy service of c. 209A orders. The form includes information about various places where the defendant might be located; whether the defendant is known to have a history of mental illness, substance abuse, or violence toward police officers; and whether the defendant is believed to have access to firearms. If your court is not currently using this form, you may wish to confer with staff from your local District Attorney's office, other advocates who assist plaintiffs in seeking c. 209A orders and court officials, to discuss how use of the form could assist police efforts.

(h) Liability: It is understood that officers have no way of knowing exactly how many guns a defendant has or, in some cases, whether a defendant owns guns at all. Under the public duty rule, officers cannot be held liable even for negligent failure to provide adequate police protection or prevent crime, as long as they have not made an explicit, specific assurance of safety. Therefore, unless officers intentionally disregard known facts about a defendant's possession of guns and failure to turn them over, or explicitly assure a victim that the defendant no longer has any guns, officers will not be held liable under state law for harm cause by weapons that were not surrendered. G.L.c.258, §§ 10(h) and 10(j).

It is suggested that, in order to have a complete record, officers as a matter of practice specifically advise the defendant of the terms of the suspension and surrender order, inquire regarding the defendant's possession of guns and seek their surrender, and specifically note the defendant's responses in their reports.

III. Court Review of Suspension and Surrender Order -- Procedures, Standard of Review, and Effect on Existing Orders

(a) General: A defendant can petition the court at any time for a review of the original suspension and surrender order. A hearing must then be held within 10 court business days after the court receives the petition for review. The court, as a matter of practice, is expected to undertake notification to the plaintiff of the hearing. The hearing on the suspension and

surrender order may be heard contemporaneously with the 10-day hearing on the protective order.

(2) Firearm Needed for Employment: If the defendant files an affidavit that a firearm is necessary for the defendant's employment and requests an expedited hearing, then the defendant is entitled to a hearing, on the suspension and surrender issue only, within 2 court business days of court receipt of the affidavit and request.

(3) Standard of Review: At the petition for review, and upon any continuation and/or modification of an order issued under c. 209A, § 4, the court shall order or continue to order the suspension of permits and surrender of guns if it makes a determination that their return "presents a likelihood of abuse to the plaintiff." It appears that this provision also would apply to the modification or extension of orders already in existence; that is, upon a sufficient showing, a suspension and surrender order could be added as a modification to an existing order.

If the court does not find by a preponderance of the evidence that return of the guns and licenses presents a likelihood of abuse to the plaintiff, or if the underlying c. 209A order expires or is vacated, then the suspension and surrender order will terminate.

(4) Duration of Order: Unless the order is revoked by the court after hearing, a suspension and surrender order continues in effect as long as the restraining order to which it relates is in effect.

IV. Storage of Surrendered Guns

Sections 9 and 10 of the Act relate to the handling and storage of guns and ammunition surrendered under the provisions of the statute. These sections appear to have a standard 90-day effective date, August 23, 1994, although section 10 called for a report by the Executive Office of Public Safety and the Colonel of the State Police on plans to store firearms by June 1.

These sections provide that any licensing authority receiving or taking possession of items surrendered under section 3B of chapter 209A may either, at its own election:

(1) Hold them, storing them in accordance with standards to be promulgated by the Executive Office of Public Safety, which are in the process of being drafted; or

(2) Transport them to the State Police for storage. A Special Order has been issued by State Police Col. Charles Henderson advising all Troop and Station Commanders of the new law and the fact that municipal departments may choose to deposit firearms taken into custody under the law with the State Police for storage. He advises that the firearms, if presented, should be accompanied by a copy of the incident report, if any, and the surrender order issued by the Court.

As many of the surrender and suspension orders may expire within 10 days (either because the emergency or temporary order is not extended or because the Court, after review, declines to continue the order), even those departments choosing to transport guns to the State Police for storage may wish to hold them for this initial period to avoid unnecessary transport of the weapons.

The authority storing the guns must issue a receipt to the owner stating where the guns are to be held.

The owner has the right, up to one year after a surrender order has issued, to transfer the guns and ammunition seized to a licensed dealer.

If not reclaimed by the owner within one year after the order is vacated or has expired, the items are to be destroyed.

V. Additional Provisions The legislation also:

(1) Disqualifies anyone currently the subject of a license suspension and gun surrender order issued under c. 209A, § 3B, from obtaining an FID card or License to Carry. (Sections 1 and 3 of the Act, amending c. 140, § 129B and § 131.)

(2) Excludes anyone whose permit was suspended pursuant to the new statute, and who had a hearing reviewing the suspension under the terms of the statute, from the provisions of c. 140, § 129B, which allow an appeal of suspensions within 90 days to the District Court. (Section 2 of the Act.)

B. OTHER GUN TRAFFICKING AND PENALTY PROVISIONS -- effective July 1, 1994.

I. Penalty for Purchasing Gun for Another

The statute also increases the penalty for using one's FID card or LTC to purchase a gun for the unlawful use of another, for resale, or for giving to an unlicensed person, to imprisonment for from 2-1/2 to 10 years in state prison and/or a fine of $1000 to $50,000, and attempts to provide for concurrent District Court jurisdiction over this offense. However, since no House of Correction sentence is provided, and since the District Court cannot sentence to State Prison, District Court jurisdiction could be maintained only if a fine were the sole sanction to be imposed. (Sections 4 and 5 of the Act, amending c. 140, § 131E, c. 218, § 26.)

II. Gun Trafficking-- G.L. c. 269, § 10E

The legislation adds a new Section 10E to Chapter 269 of the General Laws, creating the crime of Trafficking in Firearms. It provides graduated mandatory minimum sentences for anyone who, within a 12-month period, except as otherwise provided by law, sells or otherwise transfers various quantities of guns.

3-9 guns --	not less than 3 years, not more than 10 yrs., and not more than $50,000 fine
10-19 guns --	nlt 3 years, nmt 10 yrs., and nmt $100,000
20+ guns --	nlt 10 years, nmt life, and nmt $150,000

Legislative Analysis: Chapter 68 of the Acts of 1994: "The Bail Reform Act"

Diane Juliar, Assistant Attorney General
Chief, Family and Community Crimes Bureau

"An Act Relative to the Release on Bail of Certain Persons," generally known as the Bail Reform Act went into effect on Saturday, August 13. The Act makes a number of changes in the bail statutes of the Commonwealth and will affect both prosecutorial and police practices.

SUMMARY OF THE STATUTE

I. GENERAL

The law makes several changes in existing bail procedures and adds an entirely new procedure by which the Commonwealth can move, based upon an allegation of the defendant's dangerousness, to have the defendant detained until trial, if necessary to protect the public. In the alternative, the Court can order specific terms of release crafted to eliminate the danger and to ensure the defendant's appearance in court.

II. HEARING ON "DANGEROUSNESS" -- G.L. c. 276, § 58A

The statute adds a new § 58A to G.L. c. 276, establishing a procedure for determining whether, and on what conditions, a defendant should be released pretrial if there is an allegation of dangerousness "to the safety of any other person or the community."

A. CRIMES TO WHICH THE STATUTE APPLIES

This proceeding is initiated upon motion by the Commonwealth requesting either an order of detention, or of release on conditions, and is available only for the following crimes:

-- felony offenses that have as an element of the offense the use, attempted use, or threatened use of physical force against the person of another;

-- any other felony that by its nature involves a substantial risk that physical force against the person of another may

result, including burglary and arson, whether or not a person has actually been placed at risk;

-- violations of orders issued under M.G.L. c. 209A, §§ 3, 4, 5 (vacate, no contact, and refrain from abuse orders - emergency, temporary and "permanent");

-- violations of orders issued under G.L. c. 208, §§ 18, 34B, or 34C (protective orders and orders to vacate the marital home issued in divorce actions);

-- violations of orders issued under G.L. c. 209, § 32 (prohibiting restraint of a spouse's personal liberty);

-- violations of orders issued under G.L. c. 209C, §§ 15 or 20 (certain orders in paternity cases);

-- misdemeanors or felonies involving abuse as defined in G.L. c. 209A, § 1 <u>while a protective order issued under c. 209A was in effect</u> (this would include crimes constituting "abuse" against a victim other than the plaintiff in the existing c. 209A order);

-- drug offenses with mandatory minimum sentences of 3 years or more [that is, most drug trafficking or subsequent offense drug distribution charges, including G.L. c. 94C, §§ 32(b), 32A(d), 32E(a)(2)-(4), 32E(b)(1)-(4), 32E(c)(1)-(4), 32F(a),(b),(d), 32K)];

-- "a third or subsequent conviction" of OUI under G.L. c. 90, § 24 (apparently intended to refer to a <u>charge</u> of being a third or subsequent offender; amendment is being sought).

B. <u>PROCEDURES FOR THE HEARING</u>

The hearing is initiated by the Commonwealth's motion at arraignment. The hearing will be held immediately, <u>unless</u> either party moves for a continuance. A continuance cannot exceed 3 business days if it is at the Commonwealth's request, or 7 days if it is at the defendant's request. Upon a showing of probable cause for the arrest, the defendant "shall be detained" until the hearing.

The defendant has the right to be represented by counsel and "to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information." The rules of evidence do not apply at the hearing.

C. FACTORS TO BE CONSIDERED

In determining whether or not release on personal recognizance or conditions "will reasonably assure the safety of any other individual or the community," the judge is directed to take into account the following factors:

(1) the nature and seriousness of the danger posed to any person or the community that would result from the prisoner's release;

(2) the nature and circumstances of the offense charged;

(3) the potential penalty the defendant faces;

(4) the defendant's family ties;

(5) the defendant's employment record;

(6) the defendant's history of mental illness;

(7) the defendant's reputation;

(8) the risk that the defendant will obstruct or attempt to obstruct justice or threaten, injure or intimidate or attempt to threaten, injure or intimidate a prospective witness or juror;

(9) the defendant's record of convictions;

(10) any illegal drug distribution or present drug dependency;

(11) whether the defendant is on bail pending adjudication of a prior charge;

(12) whether the acts alleged involve abuse as defined in c. 209A or violation of a restraining order;

(13) any history of restraining orders issued against the defendant;

(14) whether the defendant was on parole or other release pending completion of a sentence for any conviction or on release pending sentence or appeal from any conviction.

D. STANDARD FOR PRE-TRIAL RELEASE DETERMINATION

If the judge concludes that release on personal recognizance "will not reasonably assure the appearance of the defendant...or will endanger the safety of any other person or the community," the judge then must determine what, if any, conditions of release will assure the defendant's appearance and the safety of others.

1. DETENTION

If the judge finds by clear and convincing evidence that no conditions of release will reasonably assure the safety of any other person or the community, the judge shall order detention of the defendant prior to trial.

The period of detention cannot be longer than 90 days, excluding periods of justifiable delay.

2. RELEASE ON CONDITIONS

If the judge determines that release on conditions will reasonably assure the safety of others, the judge shall order pretrial release, subject to the least restrictive further conditions, with 14 examples of conditions the judge may impose set out in the statute.

E. VIOLATION OF CONDITIONS OF RELEASE

If there is probable cause to believe that a defendant released under § 58A committed a federal felony or any of the offenses for which a dangerousness hearing can be held while on release, there is a rebuttable presumption of "dangerousness" at the subsequent hearing for revocation or modification of release conditions.

Clear and convincing evidence of violation of any other condition of release also subjects the defendant to revocation of

release and an order of detention, if the judge concludes either that no conditions of release will eliminate the danger posed, or that the defendant is unlikely to abide by any conditions set.

F. BAIL APPEAL

The Court's findings following a hearing under †58A are appealable to the Superior Court, which can consider the "record" from the District Court, which the defendant and the prosecution have a right to supplement.

III. OTHER STATUTORY CHANGES

The Bail Reform Act makes the following additional changes relevant to bail:

A. OFFENSE COMMITTED WHILE ON BAIL

Under current law, if a defendant is out on traditional bail and commits another offense, there are procedures for the court to revoke bail on the prior charge and order the defendant held without bail for not more than 60 days pending trial. The new statute provides that this bail revocation hearing shall be held in the court where the defendant is being arraigned on the new charge.

In addition, the statute provides that the sentence imposed for the new crime shall be consecutive to the sentence for the crime for which the defendant was on release.

B. PENALTY FOR FAILURE TO APPEAR AFTER RELEASE

The penalties under G.L. c. 276, § 82A for failure to appear after release on bail or recognizance are increased:

For a misdemeanor offense, a fine of up to $10,000 and/or up to one year in the House of Correction;

For a felony offense, a fine of up to $50,000 and/or up to 5 years in state prison or 2-1/2 years in the House of Correction.

Any term of imprisonment imposed under this section is to be consecutive to the sentence imposed on the underlying crime.

IV. ISSUES/IMPLICATIONS FOR POLICE

The following are several of the issues we raised with the District Attorneys and discussed at a meeting held last week.

A. BAIL SET AT THE POLICE STATION

As the new § 58A, providing for a hearing on "dangerousness," can only be initiated by a motion filed by an attorney for the Commonwealth upon the defendant's appearance before a judge, the new proceeding does not directly apply to out-of-court pretrial release decisions (that is, those made by a bail magistrate at the police station).

The Bail Administrator for the Commonwealth, who oversees those acting as bail magistrates, has advised the bail magistrates that, in setting bail at police stations, they explicitly should consider whether the defendant is charged with a crime for which the Commonwealth could move for detention under § 58A and, if so, consider that fact as relevant to the nature and circumstances of the offense and, therefore, relevant to the defendant's likelihood of appearance at trial. We do not yet know if such a directive will be sent.

In any event, we suggest that, in any case in which a bail magistrate will be considering bail, officers attempt to determine whether the defendant falls within one of the categories for which the Commonwealth could request a dangerousness hearing and, if so, bring this to the bail magistrate's attention.

B. INITIAL POLICE INVESTIGATION

In a case in which you believe the Commonwealth may seek a dangerousness hearing, officers may wish to obtain "up front" as much information as possible, from witnesses with whom they will be speaking, relevant to the factors the judge will consider at the hearing (see section IIC, above). This may avoid the need to immediately re-locate and re-interview witnesses who have relevant information in preparation for the hearing.

In addition, the information obtained at this stage, and any recommendations police may have based upon it, are likely to

be helpful to the prosecutor in deciding whether to move for a dangerousness hearing.

C. ARRAIGNMENT -- POLICE PROSECUTORS

Police prosecutors who currently handle arraignments in certain courts will need to make arrangements with their local District Attorney's office for initiating dangerousness hearings.

D. POLICE TESTIMONY AT DANGEROUSNESS HEARING

Since the rules of evidence do not apply at the hearing, it is anticipated that, to the greatest extent possible, evidence will be introduced through the testimony of police witnesses, rather than requiring the victim to take the stand and be subjected to cross-examination. Additional testimony may be needed at the Superior Court if the defendant seeks review of the judge's decision. Testimony will also be needed in Superior Court when defendants are arraigned on indictments and the Commonwealth is seeking detention or release on conditions.

The implications for police court time, and the related expense to police departments, are obvious.

V. CONCLUSION

The issues set forth above are those that appear to be most relevant to police practices. We have also raised and discussed with the District Attorneys many other legal issues posed by the statute, including:

-- What does the phrase "felony that by its nature involves a substantial risk that physical force against the person of another may result, whether or not ... a person has been placed at risk thereof" mean? Does it depend on the charge, or the facts of the particular case (for example, does it cover a B & E/Building, or Larceny M.V., where a confrontation with the owner resulted)?

-- What constitutes "dangerousness?" Can the mere nature of the crime for which the defendant is being arraigned be sufficient?

-- Before the defendant is allowed to call the victim or other Commonwealth witnesses to testify at the hearing, can the judge require some showing that relevant testimony is likely to result, and that the defendant is engaged in more than a "fishing expedition" or attempt at intimidation?

[Editor's Note: Those interested should be aware that several challenges to the constitutionality of the new statute have been made, and are working their way through the trial courts presently.]

Legislative Analysis: Chapter 25 of the Acts of 1994: "New Drunk Driving Bill"

By Diane Juliar, Assistant Attorney General
Chief, Family Community Crime Bureau

On May 27, 1994, the Governor signed Chapter 25 of the Acts of 1994, the first major overhaul of drunk driving laws in Massachusetts since the Safe Roads Act of 1986. The law went into effect immediately except for one section providing for Administrative License Suspension (ALS), which went into effect on June 27, 1994.

A memorandum dated June 21, 1994, from the Registrar of Motor Vehicles to all state and local police departments provides instructions and forms for police to use in implementing the new law. In addition, a memorandum dated May 27, 1994, from District Court Chief Justice Samuel Zoll to all District Court Judges outlined the new drunk driving law from the court's perspective. This article does not repeat the summary of the law contained in those two documents. Rather, it is intended simply to supplement those memoranda with several additional observations relevant to the law enforcement community. Also, it should be noted that several amendments to the statute have already been adopted (Sections 101 through 112 of Chapter 60 of the Acts of 1994, the state's FY 95 budget), attempting to address several concerns raised about the language of Chapter 25. This article reflects those amendments.

ADMINISTRATIVE LICENSE SUSPENSION (ALS)

Under the new law, police are directed to take possession of the license of every arrested driver whom the police have reasonable cause to believe was operating under the influence of intoxicating liquor and who either:

(a) refuses a breath test; or
(b) if age 21 or older, records a BAC of .08 or more; or
(c) if under age 21, records a BAC of .02 or more.

When the driver has a valid Massachusetts license in his or her possession, the police are directed to confiscate that license, issue a notice of intent to suspend, and issue a temporary driving permit. The police are to physically take the person's license and give the person a "temporary permit" that

will become effective 12 hours after the time of issuance and that will remain effective until the fifteenth day after the arrest. The driver has various rights to appeal the suspension.

NOTE: The new law is clearly intended to make the police, as opposed to the court, the primary agent for license suspensions following arrest for OUI. Under this so-called "ALS" provision of the new law (§ 24P), the police "shall" act to initiate a license suspension following a person's arrest when such person either refuses to take a breath test or takes and "fails" a breath test.

There is nothing in the law to suggest that the police have a choice whether to initiate a license suspension under the ALS provision or to simply wait for the court to act the next day at arraignment. The language of the statute appears to require the police to act at the time of arrest if the conditions are met and leaves the § 24N suspension procedure available as a safety valve in the event police action cannot or does not take place (for example, defendant was immediately hospitalized, or was not immediately apprehended). Therefore, it appears that the § 24P suspension should be initiated by the police in virtually every case.

Under the original statute, there was a problem with the operation of this provision in cases involving persons under the age of 21 who took the breath test and registered a BAC of .02 through .05. The penalty of a license suspension for an additional 180 days, required by G.L. c. 90, § 24D, when a person under 21 refuses the breath test or scores .02 or greater, appeared to apply only when the person was "charged" with an offense. However, a person registering .05 or less generally would not be "charged." And if the police took no action to initiate a license suspension at the time of arrest, there would be no reason for the person to appear before the court for arraignment (which would allow the "back-up" of a license suspension under c. 90, § 24N).

The July amendments explicitly provide that the license suspension provisions apply to persons "**arrested for or charged with**" violations under sections 24, 24G, or 24L; that in the case of an under-21 driver registering .02 or greater, the officer "shall" suspend the license or permit in accordance with c. 90, § 24(1)(f)(2); and that if the officer fails to do so and no criminal OUI complaint issues, the Registrar "shall

administratively suspend" the license or right to operate, upon receipt of a sworn report from the officer, on a form promulgated by the Registrar, endorsed by the police chief.

NOTE: Some inconsistencies appear to remain in the statute, even following the corrective amendments. We will pursue action on these.

OTHER HIGHLIGHTS

1. A third offense OUI is made a felony punishable by up to 5 years in state prison (with a 2 1/2 year House of Correction alternative), and a mandatory minimum 150 day sentence.

2. A fourth offense OUI is made a felony with a mandatory minimum penalty of one year in the House of Correction.

3. A new category of fifth offense OUI is created, punishable by a mandatory minimum two years in the House of Correction.

NOTE: Third and subsequent offenses are now felonies, for which the Commonwealth can seek pre-trial detention on dangerousness grounds under the new bail law.

4. Fines have been increased, ranging from a maximum of $1,000 for a first offense to $50,000 for a fifth offense.

5. The BAC which allows a permissible inference that the defendant is "under the influence" of alcohol is lowered from .10 to .08.

NOTE: Changes in the breathalyzer regulations also have been promulgated which, in addition to referencing the new .02 and .08 figures, also provide that if two subject BAC analyses differ but are within +/- .02 BAC units of each other, "the lower of the two subject analyses shall be taken as the defendant's" BAC (rather than disqualifying the test).

6. When the defendant refuses to submit to a chemical test or analysis of his breath or blood, the statute now provides that the judge may take immediate physical possession of the defendant's license, if the police have not already done so. **In order for refusal to submit to a breathalyzer to result in this seizure, however, the defendant must have been informed that any**

refusal to take the test may result in license loss for at least 120 days but not more than one year. The new law still requires the police to "prepare a written report of such refusal."

NOTE: This gives rise to another possible inconsistency in the statute, with consequences that may benefit the defendant unless the police exercise great care. As noted, the statute provides that defendants be advised they face license loss of from 120 days to one year for refusal to take a breathalyzer. Regulations provide that defendants must be informed of the consequences of refusing to take a breath test. Although the statute is somewhat unclear, it appears that in some cases involving offenders under age 21, license loss may be for up to 18 months (for example, this may occur in cases involving third offenders under age 21). This point needs further clarification.

NOTE: As under the prior law, any subsequent license loss that takes place as a result of a conviction on the OUI charge is to be in addition to the license loss that occurred before the conviction. Therefore, it appears that when a person's license is suspended before trial because of a refusal to take the breath test, whether the suspension is initiated by the police or results from court action, it is not terminated and cannot be merged with any license suspension that may result from a conviction.

7. There is a new "second chance" § 24D program for certain second offenders who have one prior conviction which occurred between 6 and 10 years previously. The Court may allow such a defendant to enroll in an out-patient (rather than in-patient) alcohol education program. The defendant will still face a loss of license for at least two years, however (the standard "second offender" suspension).

8. For second offenders who aren't allowed to use the "second chance" § 24D program, a differential has been established between a mandatory minimum sentence of 14 days in an in-patient treatment program or 30 days in the House of Correction.

9. Provision is made for alternative sentencing to an "intermediate sanction" in place of the mandatory minimum sentences under the to-be-established sentencing guidelines.

10. A person cannot be "prosecuted" for operating after suspension or revocation based upon failure to pay an

administrative license reinstatement fee "without a prior written notice from the registrar mandating payment thereof."

11. Persons under the age of 21 who are convicted of purchasing or attempting to purchase alcoholic beverages in violation of G.L. c. 158, § 34A, or transporting alcohol in violation of c. 138, § 34c, shall now lose their license or right to operate a motor vehicle for 90 days.

OTHER ISSUES

There are several areas in which the new law appears to operate more leniently than previous law. Among them are the following:

(1) Under previous law, a defendant who "failed" a breathalyzer test lost his or her license immediately upon arraignment. These defendants are now entitled to drive an additional 15 days after arrest in virtually all cases.

(2) Although the new law provides that a defendant charged as a second or subsequent offender who refuses a breathalyzer shall face a longer license suspension, it also provides that, upon acquittal, the defendant's license shall be reinstated unless the Commonwealth proves that restoration would be likely to endanger the public. It is generally understood that refusal to take a breathalyzer increases the likelihood of acquittal. Since the response of license suspension for such refusal arguably is intended to provide an incentive to take the breathalyzer, to serve independently as a "sanction" for the defendant's breach of his or her "implied consent" to take a breathalyzer if properly requested to do so, and to keep potentially dangerous drivers off the road, the newly-enacted provision is inconsistent with these purposes and may have the effect of rewarding the "knowledgeable" repeat offender for refusing the breathalyzer.

(3) Also as noted above, certain second offenders will no longer face either in-patient treatment or incarceration, but instead may receive out-patient alcohol education and treatment.

(4) If the computer is ever "down" when police are processing an OUI defendant, issuance of a 15-day temporary permit without waiting for the Registry information could result in police issuing a permit to an individual who has already lost his or her

right to operate in the Commonwealth. **No permit should be issued until valid information from the Registry is obtained.**

LIABILITY ISSUES

We have been advised that some law enforcement officers are concerned about potential liability if they issue a temporary permit to a defendant who, operating under the authority of that permit, subsequently injures someone.

The Executive Office of Public Safety has requested the Attorney General's opinion on this issue, and research is currently under way. The results will be circulated to the law enforcement community. Our preliminary review suggests that compliance with the statute does not add new grounds for liability, given the mandatory nature of the statute, combined with the immunity conferred by the Massachusetts Tort Claims Act and existing case law.

NOTE: Challenges to the constitutionality of various provisions of the new law are pending. We will keep you advised of relevant developments.

NEW OUI CASE

On September 23, 1994, the Supreme Judicial Court decided the case of Commonwealth v. Zevitas. In Zevitas, the SJC held that the jury instruction set forth in G.L. c. 90, § 24(1)(e), to be given in cases in which no blood alcohol evidence was introduced, unconstitutionally compels an accused to furnish evidence against himself or herself in violation of Article XII of the Massachusetts Constitution. The Court held that the instruction was equivalent to telling the jury that the reason no test was conducted was that the defendant refused to submit to a test, in spite of language in the instruction stating that "there may be a number of reasons why such a test was not administered," that there should be no speculation as to the reason and no adverse inference to be drawn, and that the verdict should be based solely on the evidence actually presented in the case. **This case should have no effect whatsoever upon police practices.**

OTHER RECENT LEGISLATION

Chapter 60 of the Acts of 1994

This coming year's budget, the Fiscal 1995 General Appropriations Act includes several changes to legislation, most which became effective July 1, 1994.

Section 174: created two new criminal offenses. First, M.G.L. c. 266, § 123A penalizes defacing or destroying walls, fences, or gravestones. Second, § 123B outlaws painting, or placing stickers upon, the same types of property as in § 123A. Both sections authorize incarceration and fines, mandatory restitution, and a one year operators license suspension.

A PARTNERSHIP AGAINST CRIME- THE SAFE NEIGHBORHOOD INITIATIVE

Susan Spurlock, Assistant Attorney General
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The Safe Neighborhood Initiative (SNI) is the outgrowth of a three-year partnership between the offices of the Attorney General and the Suffolk County District Attorney. In February 1991, Attorney General Scott Harshbarger assigned three full-time Assistant Attorneys General to work with the Suffolk County District Attorney's Office prosecuting major violent felonies and gang-related offenses. This unit of attorneys was responsible for prosecuting hundreds of cases directly resulting from urban violence.

While this contribution to existing prosecution efforts and infusion of additional resources were helpful, both Attorney General Harshbarger and District Attorney Ralph Martin agreed that the problems facing urban neighborhoods demand a comprehensive, multidisciplinary approach, namely, a collaborative effort between law enforcement (police, prosecution, the courts, probation), human services and the community to effectively deal with escalating violence and fear that threaten the quality of life in Boston's neighborhoods.

To accomplish these ends, on February 22, 1993, the SNI was formed as a pioneering partnership among community residents, the Attorney General's Office, the District Attorney for Suffolk County, the Boston Police Department and the Mayor's Office of Neighborhood Services.

The overall mission of the SNI is to bring law enforcement and community organizations together in a coordinated way that will assist in revitalizing a neighborhood plagued by a variety of societal problems.

The SNI brings increased law enforcement and prosecutorial efforts to a designated geographical area. The target area designated for this project consists of the residential and business areas of Fields Corner, Bowdoin Street, Four Corners and Geneva Avenue in Dorchester. This area was chosen as the target area for the SNI based on the high incidence of urban crime (gang-related violence and drug distribution), the intensive concentration of investigative and prosecution efforts within one

police district and district court, as well as the level of existing community-based programs and neighborhood crime watch groups. By concentrating on one geographical area, the SNI has demonstrated the tangible results achieved when residents, law enforcement and human service representatives join together to free a neighborhood from violence's iron grip and improve the quality of life for all.

The Safe Neighborhood Initiative prosecution unit, comprised of two Assistant Attorneys General and an Assistant District Attorney, prosecutes major felonies that occur within the Boston Police Department Area C-11. The unit also prosecutes cases involving particular locations, individuals, and types of crimes that the unit has identified as especially serious.

To date, the SNI unit has screened over 1600 cases, ranging from misdemeanors to major violent felonies, and accepted almost 127 cases for prosecution. Over 50 of the most serious cases have been indicted in Superior Court and have resulted in a substantial number of convictions and the imposition of lengthy prison terms. Approximately 110 cases have been handled by the unit in Dorchester District Court, with many committed sentences being imposed. Since its inception, the SNI has unit provided assistance to a number of law enforcement agencies, including the Immigration and Naturalization Service in immigration and deportation proceedings in Dorchester District Court.

The Safe Neighborhood Initiative unit has also worked with local community development groups, private institutions, and state and local representatives to target abandoned property within the area for rehabilitation and re-sale. As part of the Safe Neighborhood Initiative, the Attorney General's Office has worked with the Boston Police and telephone companies to remove pay telephones that have been used as a haven for drug and gang activity within the target area, and has worked with local communication companies to remove billboards that depict violence. The Attorney General's Office has worked closely with the Safe Neighborhood Initiative Advisory Council and community groups, including business groups and crime watch groups, to address criminal activity and other community issues. This office's Student Conflict Resolution Experts (SCORE) program has been implemented in the Grover Cleveland Middle School in the target area and in Dorchester High School.

Recently, the Attorney General's Office was awarded a $382,972.00 grant by the Massachusetts Committee on Criminal Justice. This grant will enable the SNI participants and community residents to expand the project in three core areas of crime prevention and reduction. Specifically, the funding for the SNI is for; 1. Coordinated Law Enforcement which will allow expanded police presence and surveillance and expanded prosecution efforts; 2. Neighborhood Revitalization efforts including the funding of "This Neighborhood Means Business!", an innovative education program for small business owners; and 3. Violence Prevention and Treatment including a number of programs designed to help prevent crime and violence from occurring in the target area.

The SNI program, encompassing crime prevention and enforcement, and utilizing government and citizen action, has proven itself to be a valuable asset to the target community. Hopefully, it may serve as a model of partnership for other programs in neighborhoods throughout the Commonwealth.

AN OLD WEAPON IN A NEW WAR: LANDLORDS WHO FAIL TO EVICT DRUG-DEALING TENANTS FACE POSSIBLE CRIMINAL PENALTY, INJUNCTION AND/OR FORFEITURE

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Asset Forfeiture Unit
Narcotics and Organized Crime Division

In recent years police departments have been using an old law dating back to the 1830s, which was used to fight prostitution, to fight the war on drugs. The law is the Common Nuisance statute, M.G.L. c. 139, which was amended in 1985 to help fight the war on drugs.

Chapter 139, § 19 of the Massachusetts General Laws allows a landlord to evict a tenant who is violating the Controlled Substances Act. The eviction may take place immediately from the landlord's property without the usual legal process because an illegal use automatically terminates the lease or any other title that gives the tenant the authority to live in the apartment.[1] Under this statute drug-dealing tenants do not have a right to the normal summary process of eviction that can be costly and time consuming to the landlords. This process enables landlords to evict the tenants in a streamline fashion at a reduced cost to the landlords. The statute tilts the scale in favor of the landlords and the non-offending tenants instead of in favor of the tenants who violate the controlled substance statutes.

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[1]M.G.L. c. 139, § 19 provides:
If a tenant or occupant of a building or tenement, under a lawful title, uses such premises or any part thereof for the purpose of . . . or the illegal keeping, sale or manufacture of controlled substances, as defined in section one of chapter ninety-four C . . . such use . . . shall cause at the election of the lessor, owner, or said housing authority annul and make void the lease or other title under which such tenant or occupant holds and, without any act of the lessor, owner, or housing authority, shall cause the right of possession to revert and vest in him, and he may, without process of the law, make immediate entry upon the premises, or may avail himself of the remedy provided in chapter two hundred and thirty-nine.

In order for the landlords to able to evict the dealing tenant under the nuisance statute, they must first know about existence of the drug problems occurring at their properties, which is accomplished in two ways. The landlord may have actual knowledge of the narcotics violations or receive notice of the drug violations taking place on the property. The notice to the landlord is accomplished by him being informed of the narcotics violations occurring at his property. Local police departments and the District Attorney's Office, after an arrest is made of a person for violating the Controlled Substances Act in a building or tenement, may promptly notify landlords by registered mail of the violations that have occurred on their property and advise them of their rights pursuant to G.L. c. 139, § 19, and of the consequences they may face, if they do not address the problem. The notice should advise the landlord of the illegal activity, in which apartment the activity occurred or which tenant conducted the illegal activity, of his options under chapter 139, and of the potential penalties for failure to rectify the situation.

Landlords who continue to allow the tenants who have been violating the Controlled Substances Act to remain as tenants in their buildings or tenements, without attempting to evict them face the possibility of a criminal penalty, injunction and/or forfeiture. Under G.L. c. 139, § 20, if a landlord lets the drug activity continue after knowing about it or receiving notice about it, faces the possibility of criminal prosecution for not evicting the tenant.[2] Section 19 gives the landlord the necessary right to evict the tenant and § 20 provides the incentive to encourage the section's use.

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[2]G.L. c. 139, § 20, Aiding in the Maintenance of a Nuisance Penalized, states that whoever knowingly lets premises owned by him, or under his control, for the purpose of ... or the illegal keeping, sale or manufacture of controlled substances, as defined in section one of chapter ninety-four C, or knowingly permits such premises, while under his control, to be used for such purposes, or after due notice of any such use omits to take all reasonable measures to eject therefrom the persons occupying the same as soon as it can lawfully be done, shall be punished by a fine of not less than one hundred nor more than one thousand dollars or by imprisonment for not less than three months nor more than one year, or both.

If the landlord takes no steps to solve the drug problems in his building, the Commonwealth has two additional causes of action against the landlord or the property besides the criminal penalty. The Commonwealth may either file for an injunction against the landlord pursuant to G.L. c. 139, § 16A,[3] or forfeiture of the real property pursuant to G.L. c. 94C, § 47.[4] The injunction against the landlord allows the Commonwealth to close down the offending property for up to one year. This statute not only allows the Attorney General or the District Attorney to file a complaint for injunctive relief, but also allows a local city or town, or police department, or at least

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[3] Abatement of Common Nuisance; Liquor and Drug Nuisances.

> Upon a civil action brought in the name of the commonwealth by the attorney general, or district attorney, or the chief of police, or the board or officer having control of the police of the state, or of the town or city, or by not less than ten legal voters of the town or city, in their own name, stating that the building, place or tenement situate therein ... or is used for the illegal keeping, sale or manufacture of controlled substances, as defined in section one of chapter ninety-four C, the superior court may enjoin the person conducting or maintaining the same, ant the owner, lessee or agent of the building, place or tenement in or upon which said nuisance exists, and their grantees or assignees, from directly or indirectly maintaining or permitting such nuisance, and, subject to the provisions hereinafter contained, may order the effectual closing of such building, place or tenement, and the prohibition of its use for any purpose for a period of not less than one month nor more than one year thereafter; provided, however, that if said building, place or tenement contains other occupied dwelling units, the occupants of which were not involved in said nuisance, no such closing of other occupied dwelling units shall take place so as to adversely affect such occupants. G.L. c. 139, § 16A.

[4] G.L. c. 94C, § 47(a) forfeits the following property to the commonwealth:

> (7) All real property, including any right, title and interest in the whole of any lot or tract of land and any appurtenances or improvements thereto, which is used in any provision of section thirty-two ...

ten legal voters to file such a complaint, asking the court to enjoin use of the premises. Such a closing will not sanction the remaining occupants of the building. The only portion of the building that can be closed is the offending portion of the property. Thus, one apartment could be closed for up to one year while the remaining apartments remain open. If the court does not close the building down, it may enjoin the landlord and others from allowing such a nuisance to occur any further. If the injunction is violated, the landlord may face a suit for civil contempt. This statute, short of forfeiture, exerts control over the property by the Commonwealth.

Chapter 94C, section 47, of the Massachusetts General Laws enables the Attorney General or District Attorney to seek forfeiture of real property that is used, or intended to be used to violate certain provisions of the Controlled Substances Act. Unlike the nuisance statute that allows any violation of the Controlled Substances to set in motion the provisions of the nuisance statute, the narcotics forfeiture statute requires that the real property has been used, or was intended to be used, to facilitate the distribution and/or manufacturing of controlled substances. If the property was used to violate the Controlled Substances Act in any manner that is prohibited by section 47 (a)(7), it is subject to forfeiture.

However, under the forfeiture statute the Commonwealth can not seek forfeiture of real property held by an innocent owner.[5] Just because there are violations of the Controlled Substances Act does not necessarily mean that the real property can be

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[5] The court shall order forfeiture of all real property subject to the provisions of subparagraph (7) subsection (a) of this section, except as follows:
(3) No real property shall be subject to forfeiture unless the owner thereof knew or should have known that such real property was used in and for the business of unlawfully manufacturing, dispensing, or distributing controlled substances. Proof that the conveyance or real property was used to facilitate the unlawful dispensing or manufacturing, or distribution of, or possession with intent unlawfully to manufacture, dispense or distribute, controlled substances on three or more different dates shall be prima facie evidence that the conveyance or real property was used in and for the business of unlawfully manufacturing, dispensing, or distributing controlled substances.

forfeited. The Commonwealth must show that the property was used in violation of the narcotics laws and that the owner knew or should have know that the property was being used in such a manner and did nothing to stop the drug dealing, thereby consenting to the real property being used for the purpose of facilitating a violation of the Controlled substances Act.

If landlords are advised of the drug problems occurring at their properties, of the tool they have to solve the problems and the drug problems are still occurring after notice, then the Commonwealth has the legal authority to address the problem by criminal action, an injunction, or forfeiture.

RECENT CASES

I. Search and Seizure

A. Searches pursuant to Warrant

Search warrants: sufficiency of affidavit and allowable scope of search. Commonwealth v. Pallotta, 36 Mass. App. Ct. 669 (1994).

The defendant was arrested on drug charges after execution of a search warrant authorizing the search of his apartment. The search warrant was based, in part, on information from two confidential informants who knew the defendant and had purchased drugs from the defendant in the past and who made controlled buys from the defendant under police supervision. The defendant first argued that the affidavit submitted for the warrant was not adequate because the information from the confidential informants was insufficient.

The court held that there was probable cause to search the property because the information from the unnamed informants included a sufficient showing that the informants knew the defendant, had bought cocaine from him directly, knew where he operated, and recognized him from past experience as a drug distributor.

As to the required showing of the informants' reliability, the court noted that affidavit pointed to specific information on their knowledge as to the availability of cocaine and their participation in the seizure of several ounces of cocaine from a named drug offender. However, the **court placed particular emphasis on the controlled buys** the informants made. Because the two informants made independent, separate buys, the court held that this was strong evidence of the reliability of other information provided by the informants.

In addition to challenging the information from the confidential informants, the defendant also argued that the police exceeded the scope of the warrant. During the search, the police searched not only the defendant's first floor apartment, but also two rooms on the second floor of the house. The Court found that the search of the second floor was appropriate because the area was "integral to, and in a practical view part of, the first floor apartment." The police also searched the defendant's car in the driveway of the apartment house, even though the car was not mentioned in the warrant. The court held that **a car**

owned by the occupant of a residence, when parked in the driveway of that residence, is considered part of the residence and thus was within the scope of the warrant.

Showing required to justify disclosure of an informant. Commonwealth v. John, 36 Mass. App. Ct. 702 (1994).

A district court judge erred in dismissing a criminal complaint for the Commonwealth's failure to comply with an order allowing defendant's discovery motions, which sought further information about a confidential informant's controlled buy of cocaine from the defendant's apartment. The defendant had not asserted any facts by affidavit in support of his discovery motions to overcome the presumption of the warrant's validity or to entitle him to a hearing to determine whether he had met the burden required to justify disclosure of an informant's name.

In order to necessitate such a hearing, the defendant must by affidavit assert facts which cast a reasonable doubt on the veracity of material representations made by the affiant concerning a confidential informant. The defendant is required to make a substantial preliminary showing that a false statement, knowingly or intentionally, or with reckless disregard from the truth, was included by the affiant in the warrant affidavit.

Here the defendant acknowledged that he did have any information sufficient to make the showing required, but rather he argued that the judge should allow his motions simply so he could obtain more information. The Commonwealth has a privilege not to disclose the identity of an informant. This privilege not only protects the release of names but also forbids the disclosure of details that would in effect identify the informant. Where the defendant did not make the requisite showing, the Commonwealth is entitled to not disclose the non-percipient informant.

B. **Warrantless Searches**

Observations of suspect during Terry stop/photographic line up. Commonwealth v. Caldwell, 36 Mass. App. Ct. 570 (1994).

The victims in this case, who were abducted and sexually assaulted by the same man over a period of several hours, gave the police a detailed description of their assailant which included the brand of cigarettes he smoked. The morning after the assault, two police officers saw the defendant, who closely fit the description of the assailant, walking on the street.

They approached, asked him for identification, and used a ruse to get him to produce his cigarettes. The defendant moved to suppress the officers' testimony about their observations during the stop. The Appeals Court upheld the denial of the motion, since (1) the police had reasonable grounds to believe the defendant met the description of the assailant, (2) they did not restrain the defendant in any way, and (3) their attempt to obtain information from the defendant was within the limits of acceptable police procedure.

The defendant also moved to suppress evidence of the photographic identification of the defendant because the police had lost the original array. Although the police had recorded at least some of the photo identification numbers used in the array, their practice of assigning a single photo identification number to an individual - even though multiple arrests have resulted in multiple photographs in which he has a different appearance - made it impossible to identify which particular photographs had been part of the array. While the Appeals Court did not accept the defendant's argument, it did comment that this police practice creates confusion in situations where the original array is not preserved.

NOTE: THE SJC HAS GRANTED FURTHER APPELLATE REVIEW ON THIS CASE

Plain view doctrine. Commonwealth v. Dowdy, 36 Mass. App. Ct. 495 (1994).

The defendant's motion to suppress was properly denied because, where the police observed the cocaine in plain view, the officers' actions did not amount to either a stop or a search. In this case, the police responded to a radio dispatch of a shooting where the shooters were described as two African-American males walking on a specific street, in a specific direction, wearing dark clothing. The location was known to the officers as a high-crime neighborhood. Upon arrival, the police saw two men who matched the description. The officers approached them and asked if they heard any shots. Neither responded. In daylight, one officer noticed that the defendant held a partially opened package of a white substance in his right hand. The defendant tried to "palm" the package out of sight. In response to the officer's question about the package, the defendant first said nothing and then said he had found the package and thought he should hold onto it. Believing the substance to be cocaine, the officer removed the package and placed the defendant under arrest. The Court determined that the **contraband could lawfully**

be seized without a warrant because it was in plain view in a public place where the police had a right to be.

II. **Admissions and confessions**

Confessions and Admissions-suspect's request for counsel during questioning must be clear and unambiguous. United States v. Davis, 114 S. Ct. 2350 (1994).

Davis, a sailor in the United States Navy, was a prime suspect in the murder of a fellow sailor. (The victim was beaten to death with a pool cue late one night after the club on the naval base closed. One of Davis's two pool cues was found to have blood stains.)

Davis was interviewed by Naval Investigative Service Agents. They advised Davis that he was a suspect in the killing, that he was not required to make a statement, and that he was entitled to have an attorney present during questioning. He waived his rights to remain silent and to have a lawyer present. After about an hour and a half, Davis said, **"Maybe I should talk to a lawyer."** The Agents stopped the interview and told Davis they would not continue until it was clear whether he wanted a lawyer or was just making a comment about a lawyer. The Court pointed out that the actions of the Agents in asking clarifying questions were good police practice and helped protect Davis's rights, but stated that no rule required such questions. Davis told the Agents that he was not asking for a lawyer, and that he did not want a lawyer. After a break and a reminder of his rights, the interview continued another hour. Then Davis requested a lawyer. Questioning ceased. At his general court-martial, Davis's motion to suppress his statements was denied, and he was convicted of unpremeditated murder. The Supreme Court granted certiorari to address the question of how law enforcement officers should respond when a suspect makes a reference to counsel that is not clearly a request for a lawyer.

The Supreme Court discussed its rulings that when a suspect requests counsel questioning must stop until a lawyer is made available or until he himself re-initiates and that once a lawyer has been requested, questioning cannot resume if the lawyer is not present. These rules require the interrogating officers to make difficult judgment calls about whether the suspect actually asked for counsel. The Court held that this should be an objective inquiry, and that an ambiguous or

equivocal reference to an attorney does not trigger the requirement that questioning cease. "Unless the suspect actually requests an attorney, questioning may continue."

Admissibility of Inculpatory Statements/Confessions. Commonwealth v. Osachuk, 418 Mass. 229 (1994).

While being questioned at a police station after taking a deceased woman to a hospital the defendant gave three written statements, the first was suppressed and the other two were found admissible in a motion to suppress. The Supreme Judicial court reversed. The first was given in a noncustodial situation and was held admissible. The second was given after the defendant was a suspect and in custody, but had not been given Miranda warnings and had to be suppressed.

The third was the most inculpatory, and was given after Miranda warnings had been administered. The Court noted that the Commonwealth must overcome a presumption of taintedness when a statement follows a violation of a suspect's Miranda rights. That burden may be overcome by showing that a break in the stream of events occurred which insulates the post-warning statement from the pre-warning; or, the first statement did not incriminate the defendant. The Commonwealth could not meet its burden and the third statement was ordered suppressed as tainted by the earlier violation.

Promise does not render confession involuntary. Commonwealth v. Berg, Mass. App. Ct. 92-P-886 (August 24, 1994).

The defendant and his mother were home when drugs and dealing paraphernalia were found upon the execution of a search warrant. After Miranda warnings were given, the defendant denied ownership of the drugs and was told that his mother would be charged with him. He then signed a statement admitting ownership.

The Appeals Court held that the confession was voluntary. **Where no false information or threats of illegitimate action are used, a confession obtained with a promise to not charge a third party are not involuntary.** The Court cautioned that "psychological pressure generated by concern for a loved one" could in other instances be considered improper.

III. **Evidence issues**

Evidence-impeachment of witnesses. Commonwealth v. Burnett, 417 Mass. 740 (1994).

Defendant was convicted of motor vehicle homicide after a head-on collision with another car in which a passenger of the other car was killed. The driver of the other car, Besner, testified against defendant. The trial judge prohibited defendant from impeaching Besner's credibility with evidence of a prior conviction for operating to endanger. Because the witness received only a $50 fine, despite the fact that the offense was punishable with up to two years imprisonment, the trial judge correctly ruled that the prior offense was inadmissible under M.G.L. c. 233, § 21, Fourth.

The trial judge also excluded Besner's hearsay statement (overheard by defendant's mother) that he had drunk a couple of beers, "some hard stuff," and had "smoked shorts" prior to the accident. Even though Besner made this statement while in the hospital, just 1½ hours after the accident, the trial judge correctly ruled that the statement was not admissible under the "excited utterance" exception to the hearsay rule because Besner did not appear excited, upset, or otherwise under the stress of the accident when he made the statement.

Evidence-videotape simulation admissible; defendant's response to police answer to his question was not product of interrogation. Commonwealth v. Chipman, 418 Mass. 262 (1994).

The defendant was convicted of first degree murder for firing a rifle at a school bus from a hill overlooking the highway. At trial the Commonwealth offered video tape recorded months after the shooting of a view through the defendant's telescopic sight of a bus on the highway from the shooter's position. Although a significant time had passed since the incident, the vegetation had increased since the shooting and therefore tape showed, if anything, a worse view of the bus then the shooter must have had. Therefore, **the tape sufficiently represented the actual event so as to be fair and informative and was admissible.**

Further the Court held that a statement made by the defendant was admissible. That statement was made after the defendant was in custody and invoked the right to counsel. The defendant asked the police officer transporting him a question,

and the defendant's response to the officer's answer was inculpatory and not a product of interrogation.

Evidence-fresh complaint/writings of victims. Commonwealth v. Swain, 36 Mass. App. Ct. 433 (1994).

The defendant was charged in fourteen indictments with various forms of sexual abuse of a child, including rape and indecent assault and battery charges. The fourteen year old victim, his daughter, first told another person about such conduct ten months after the last alleged abuse occurred. She discussed the alleged abuse with this person, a social worker in an inpatient psychiatric hospital, only after being prompted. This had been her second visit to the psychiatric hospital. She had not mentioned such abuse to any of the hospital's staff during her first stay. She told the case worker that such abuse had occurred sporadically over a nine-year

Relevant Issues:

1. Whether the judge properly admitted into evidence borderline fresh complaint testimony regarding sexual abuses coupled with the testimony of six fresh complaint witnesses?

2. Whether the judge properly admitted the victim's poems and letters into evidence to rebut a claim that the victim's allegations were a recent contrivance?

Holding:

1. The judge improperly admitted into evidence borderline fresh complaint testimony regarding sexual abuses in view of the "piling" on of fresh complaint witnesses and thus created a sufficient risk of prejudice to the defendant.

The fresh complaint testimony was borderline because it was not clearly "reasonably prompt". Specifically, the victim delayed ten months from the date of the last alleged abuse before she first discussed such abuse with another. This length of delay alone is not unreasonable. The length of the delay became questionable because the victim: (1) was an adolescent at such time rather than a child; (2) had not been threatened, intimidated or persuaded by the defendant not to disclose the abusive conduct; and (3) had not uttered such revelations spontaneously but rather had reported them after directly questioned.

The repetitive testimony of six fresh complaint witnesses created a sufficient risk of prejudice. Repetitive testimony from fresh complaint witnesses can result in a "piling on" effect which can fuel a jury's finding that such details are substantive evidence of the commission of the crime rather than corroborative evidence.

2. The judge properly admitted certain writings of the victim to show that her allegations of sexual abuse were not recently contrived. Such evidence showed the victim's state of mind and rebutted the defense's argument that her allegations were a recent contrivance.

Evidence-results of DNA tests not admissible. Consecutive sentences for natural rape and unnatural rape of same victim on same occasion was permissible. Commonwealth v. Vega, 36 Mass. App. Ct. 635.

After a vicious rape of an elderly woman which lasted approximately one and one half hours, the victim was able to identify her assailant, as was her neighbor who had watched the defendant come and go on the day of the incident. Other witnesses were able to corroborate information which the defendant told the victim while raping her. DNA testing was completed and showed that the defendant's DNA matched DNA in semen which was found on the victim's underwear. At trial, a DNA expert testified that it was "extremely unlikely" that anyone else's DNA would match. Based on this evidence, Vega was convicted of one count of unnatural rape and two counts of natural rape. On the conviction for unnatural rape he was sentenced to 19 1/2 - 20 years in MCI Cedar Junction, and on the two counts of natural rape Vega was given a suspended sentence of 19 1/2 to 20 years suspended for 10 years on and after the committed sentence.

Two of the issues raised by Vega on appeal were regarding the admissibility of the DNA evidence, and whether or not successive sentences on the multiple rape counts was allowable. The case was tried in 1990. From 1991 to 1993, the Supreme Judicial Court held on three separate occasions that DNA testing was not admissible. Although the underlying technique of DNA testing, known as Restriction Length Fragment Polymorphism (RFLP) is accepted in the scientific community, the method of statistical analysis used to determine the accuracy of the test is not generally accepted. Therefore, the **DNA evidence should not have been admitted**. However, the Appeals Court held that in

light of the other overwhelming identification evidence, and the way in which the DNA evidence was presented, the introduction of the evidence did not weaken the defendant's case significantly and therefore did not require that the conviction be overturned. With regard to the consecutive sentences, the Appeals Court held that **each penetration constituted a separate crime**, and that as such consecutive sentences was permissible.

Entrapment-proof of predisposition. Commonwealth v. Vargas, 417 Mass. 792 (1994).

The Supreme Judicial Court overturned a conviction of trafficking in a half-pound of cocaine on the grounds that evidence of the defendant's earlier drug arrest was introduced at trial. The defendant was arrested after an undercover buy bust by the state police. At trial, he claimed he had been "entrapped." In order to overcome that defense, the Commonwealth attempted to show that he was predisposed to sell drugs. As proof, the Commonwealth offered evidence that, two years before the crime for which he was on trial, the defendant had been arrested in possession of 16 grams of cocaine. That earlier case was still pending at the time. The Court concluded that the defendant's **prior possession of drugs alone did not establish that he had an intent to sell** the drugs and therefore the earlier arrest could not be used to establish predisposition at the trafficking trial. The Court concluded that a prior drug crime could be offered to show predisposition to distribute drugs, only if the prior crime was committed with an intent to distribute.

Evidence-prior bad acts. Commonwealth v. Jackson, 417 Mass. 830 (1994).

The victim the defendant was accused of murdering was found nude and hogtied, as well as being intoxicated, in the Savin Hill neighborhood of Dorchester. The trial court allowed the Commonwealth to introduce evidence of an incident that occurred two years earlier where the defendant was found with an individual who was nude, hogtied and intoxicated (but still alive) within 400 yards of where the murder victim was found. Defendant appealed his convictions of murder in the first degree and kidnapping. Defendant argued that the trial court erred in admitted evidence of a prior bad act for identification purposes. **Prior bad act evidence of this kind is not admissible to show that the defendant had the propensity to commit the crimes charged. Such evidence is admissible to prove the defendant's**

identity if the two events are distinctively similar -- like a signature. The Supreme Judicial Court said that in this case the question of whether to admit this evidence was a "close one", but that they would not rule that the trial court had erred in allowing the evidence for identification.

IV. Criminal Statutes Interpreted

The Commonwealth must prove intent to permanently deprive owner in larceny of motor vehicle charge. Commonwealth v. Moore, 36 Mass. App. Ct. 455 (1994).

The court reversed the defendant's conviction for larceny of motor vehicle based on the trial judge's improper charge to the jury. The judge instructed the jury they could find the defendant guilty if they found either an intent to permanently deprive the owner of his property or an indifference as to whether the owner recovered his property. This was improper because **indifference as to whether an owner recovers his property is not an alternative to the requirement that the defendant intend to permanently deprive.** Indifference may be evidence of an intent to permanently deprive but it alone is not sufficient to meet that element of the offense.

Sufficiency of evidence-drug possession. Commonwealth v. Manzanillo, 37 Mass. App. Ct. 24 (1994).

The Appeals Court reversed the defendant's conviction of drug trafficking, finding that the trial court should have allowed the defendant's motion for a required finding of not guilty. The Court held that there was insufficient evidence of defendant's possession of cocaine found in his vehicle, where the defendant was operating the vehicle (a van), defendant's friend was in the passenger seat, a passenger for hire being transported from New York to Massachusetts was sitting two bench seats behind the defendant, and the cocaine was found inside a paper bag, within a closed "hip bag," underneath a shopping bag, on the floor between the driver seat and the first bench seat. In these circumstances, the court found the evidence to be insufficient to show that the defendant was aware of the cocaine or that he was willing to aid in its distribution.

Proof of stalking by harassing clarified. Commonwealth v. Kwiatkowski, 418 Mass. 543 (1994).

On an appeal from a conviction for stalking, M.G.L. c. 265, § 43, the Supreme Judicial Court defined the necessary

elements for a conviction of the offense of stalking based on harassing. Proof is required of conduct which:

- -is willful and malicious;
- -involves a pattern of conduct or a series of acts (more than two incidents) over a period of time;
- -is directed at a specific person;
- -seriously alarms or annoys that person;
- -would cause a reasonable person to suffer a substantial emotional distress; and
- -the defendant made a threat with the intent to place that person in imminent fear of death or bodily injury.

The charge at issue did not involve the stalking offense based on "following." The case does not address whether two or three acts of following will support a conviction for stalking, and on that point further clarification from the Court or Legislature is required.

ASSISTANCE AND CONTACTS AT THE OFFICE OF THE ATTORNEY GENERAL

Below is a list of individuals at the Office of the Attorney General who you can call for assistance. The Main office number for all extensions listed below is (617) 727-2200. The office address is: Office of the Attorney General, One Ashburton Place, Boston, MA 02108.

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